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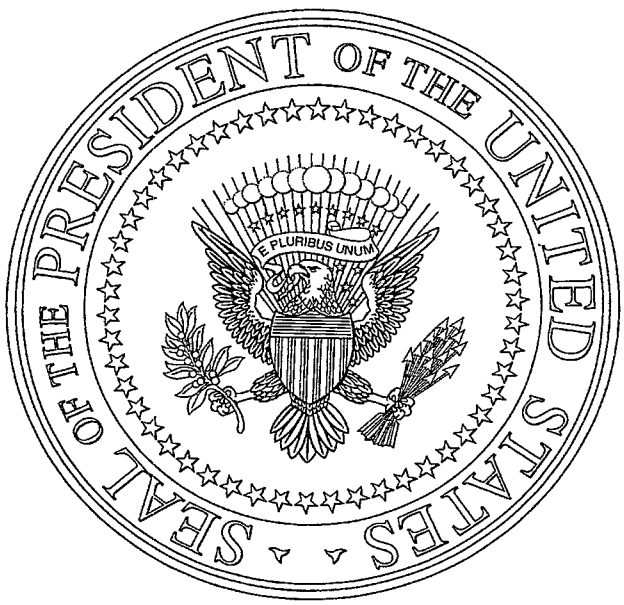
PRESIDENT CLINTON'S CLEAN WATER INITIATIVE



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Office of Environmental Policy
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PRESIDENT CLINTON'S CLEAN WATER INITIATIVE

Just as water is vital to human life, the imperative for clean water touches closely the life of every American.

Every American knows that clean water is essential, whether we draw a living on or from our waters, seek recreation in them, or look to them as a scenic setting for a home, a workplace or a site for spiritual nourishment. Water pollution remains consistently among the public's top environmental concerns. A 1993 Times Mirror poll found that 77% of the public believes that government should do more to control such pollution.

President Clinton proposes a clean water agenda that will energize our efforts to secure clean and healthy water, while making simpler and more efficient State and local governments' central role in this effort. The President's agenda strives for support of all affected sectors: State, local and tribal governments; environmental, agricultural, civic and business groups.

The Need for Action

The Clean Water Act (CWA) has dramatically improved water quality since 1972. Still, serious quality threats grow unchecked, and heightened vigilance is required for other, persistent problems. Recent State assessments show 30 percent of rivers, 42 percent of lakes, and 32 percent of estuaries surveyed continue to be degraded, mainly by silt and nutrients from farm and urban runoff, combined sewer overflows (CSOs) and municipal sewage. 740 million pounds of toxic chemicals pour into waterways and municipal sewers each year. Localized ground-water contamination is widespread.

Approximately 1,300 waterbodies have been so degraded by pesticides, organic chemicals, and metals that State authorities have had to limit the public's consumption of the fish and shellfish found therein. Bottom sediments are contaminated in more than 1,000 waterways nationwide. Bacterial contamination shrinks our shellfish beds. Beach closures diminish recreation for thousands. Commercial fishing harvests in U.S. rivers have decreased by over 80 percent. Between 60 and 80 percent of riparian corridors have been degraded.

A New Vision for Water Quality in America

> ***"We must pass a new Clean Water Act with standards for nonpoint source pollution and incentives to develop ways to reduce and prevent polluted runoff at its source."***
>
> -- President Clinton
> "A Vision of Change for America"

An updated CWA can tackle these problems through a new, more targeted approach. Through "designer partnerships" among Federal, State, and local governments, private landowners, industry and the public, we can craft flexible, innovative, efficient solutions to water quality problems, increasingly making watersheds the basis of analysis and action.

Here are the key objectives of our policy:

- to reduce nonpoint source pollution (NPS) through clear performance objectives, and by giving incentives, information and technical aid to farmers, developers, foresters and others, so they can lessen the damaging pressure their activities exert on aquatic resources;

- to streamline and strengthen regulatory and enforcement authorities to assure a prompt, effective and appropriate response to environmental and health threats;

- to slash unfunded mandates, increase flexibility and cut red tape for States, municipalities and the private sector, so resources are targeted to the most serious quality problems;

- to improve and maintain the municipal wastewater infrastructure, as too many areas find their sewers and treatment plants inadequate to protect water quality;

- to encourage dischargers to move beyond compliance with the letter of the law to innovation that will prevent pollution, promote efficiency and protect living resources; and

- to improve quality of life for all, regardless of ethnicity, race or income, leaving no group bearing a disproportionate burden of the consequences of environmental pollution.

In sum, the Clinton Administration is asking Congress, in reauthorizing the CWA, to enter a new era in environmental protection. Instead of simply controlling the end of the discharge pipe, we propose to protect and conserve our water, aquatic habitats,

and the living resources within, through an integrated, holistic approach, based on natural watersheds, and aimed at reducing pollutants from all sources that impair water quality. This vision for water quality is powerful and wide enough to realize other vital national priorities, such as improving wetlands programs, growing jobs, and addressing key border issues in the new U.S.-Mexico trade agreement.

STRENGTHENING ENVIRONMENTAL PROTECTION

The CWA has greatly improved water quality. However, emerging threats and persistent problems alike require new vigilance. The Clinton initiative will:

Strengthen State nonpoint source programs by including enforceable minimum controls in selected waters

- In conjunction with other Federal agencies and States, EPA should establish national guidance for best available management measures to control nonpoint pollution. Measures should consider costs and be broad and flexible enough for local tailoring.

- States should apply their nonpoint programs, including best available management measures, to existing nonpoint sources in targeted waters whose quality is impaired, threatened or deserves special protection, and to new sources State-wide. Site-specific plans and adaptations to local soils and climates should be encouraged if they are as effective as EPA's guidance.

- After an initial five-year implementation period, another five years should be allowed for any added controls needed to meet water quality standards. States or if necessary the Federal government should ensure compliance with State-set management measures. Federal agencies must carry out State NPS programs on Federal lands just as non-Federal entities do elsewhere.

Establish more current and comprehensive water quality standards, including a broader effort to control or prohibit the multi-media release of the most persistent toxic substances

- States should implement water quality standards programs in cooperation with EPA and other Federal agencies. EPA should develop criteria and implementation guidance based on current science, and should set such development priorities based on risk and effectiveness. States should be required to expeditiously adopt standards consistent with EPA criteria. Criteria should be automatically converted into State standards if the State fails to act. The CWA should also require protection against unacceptable degradation of special value waters.

- Where release of the most toxic, bioaccumulative and persistent pollutants poses substantial health and environmental risk and contributes to water quality impairment, EPA should have broader ability to control or prohibit them.

Strengthen Federal, State, and private citizen enforcement of the requirements of the Clean Water Act

- The Administration proposes Federal and State authorities for more efficient, effective, innovative enforcement, to deter violations and encourage compliance. We would streamline and strengthen enforcement provisions, involving all criminal, civil, administrative, and enforcement options, and make CWA enforcement powers consistent with comparable environmental laws.

- The Administration will also strengthen citizen enforcement -- which complements government enforcement.

- Compliance should begin at home. The Federal government must obey the Act, and so Congress should expand the waiver of sovereign immunity and establish means for Federal enforcement against Federal facilities.

Actively promote ecosystem protection and pollution prevention

- Federal agencies should, on request, help States, Territories, and eligible Tribes with all appropriate work on watershed planning and management. We propose that States, Territories, and Tribes that choose to engage fully in watershed management would have greater flexibility to (1) tailor NPS management to local conditions; (2) focus point source program resources on critical problems in key watersheds; (3) address interconnected ground water and surface water concerns; (4) weigh trading opportunities between nonpoint and point sources; (5) target the State Revolving Fund (SRF) and CWA grants to eligible, priority watershed activities, including riparian restoration; and (6) establish high priority for federal funds and technical aid for wetlands activities (e.g., identification, mitigation banks, functional evaluations and restoration plans).

- Complementing this holistic approach, the Act should allow NPDES and pretreatment programs to require industrial dischargers to consider pollution prevention approaches, to help encourage recycling and pollutant source reduction. The effluent guidelines program should be streamlined, and regularly updated to focus on reducing the greatest health and environmental risks.

REDUCING COSTS AND IMPROVING EFFICIENCY

The CWA rigidly requires all municipalities and industries to meet technology and water quality standards for combined sewer overflows and storm water discharges. The Clinton initiative will:

Reduce by four-fold the potential cost of storm water controls while achieving water quality benefits by targeting actions to select urban areas

- Wet weather runoff from storm water discharges can severely degrade water quality, but CWA mandates must address this problem more fairly and effectively. Point source (National Pollutant Discharge Elimination System, or NPDES) permits now regulate such runoff from most industries and from municipalities with populations over 100,000. The Act should apply permit requirements -- using targeted controls -- to certain urban areas with populations of 50,000 or greater, ending requirements for smaller cities. Remaining sources -- smaller cities, commercial enterprises, and light industries -- should be addressed by enhanced State NPS programs or watershed programs.

- Before requiring compliance with water quality standards, EPA and States should be allowed first to require best management measures for municipal storm water discharges. Where municipalities choose to regulate industrial storm water discharges to storm sewers, they should be allowed to displace EPA or State regulation. Finally, to encourage prevention of storm water pollution, industrial facilities that are permanently sheltered from wet weather should be exempted from NPDES storm water permits.

Reduce by four-fold the potential cost of combined sewer overflow controls while still achieving designated water uses

- Representatives of EPA, the States, cities and environmental groups have agreed on a new policy on CSO controls. Both costs and environmental impacts in this area are very high. The draft policy should be codified in the Act. By aiming resources at the most critical problems, the policy will produce cost-effective benefits, particularly for commercial fishing and urban recreation. We also recommend removing the SRF's 20 percent funding limit on fixing CSOs to provide the critically needed funding for developing CSO controls.

PROMOTING TECHNICAL INNOVATION AND MARKET-BASED APPROACHES

The Act fails to encourage innovative technologies and market-based approaches that can achieve environmental goals more efficiently. The Clinton initiative will:

Give permittees more compliance time if they adopt innovative technologies

- EPA and States should be able to give NPDES permittees enough time and flexibility to adopt new technologies that offer more effective, cheaper pollution prevention or control than current methods. EPA could explore national standards for discharges from Department of Defense vessels as an incentive to develop innovative technology for marine pollution controls.

Encourage appropriate trading as a way to achieve cost-effective attainment of water quality standards within a watershed

- Market-based approaches, including certain types of pollutant trading and State-imposed, risk-based effluent charges, may help the efficient attainment of water quality goals. When a water body receives point and nonpoint pollutants with similar effects, pollutant sources may be able to reallocate or exchange their tasks of pollution reduction.

- However, in any trading scheme, point sources must continue to meet technology-based requirements. Because toxic pollutants often have localized effects, trades must consider such possible effects near the discharges and throughout the watershed. The CWA should recognize and encourage trading and State-imposed effluent charges as means to improve water quality and should authorize demonstration programs to explore the benefits of trading.

IMPROVING FLEXIBILITY

The Act now impedes State action on priority problems due to overly cumbersome procedures and statutory priorities that do not match State priorities. The Clinton initiative will:

Allow States to establish new management frameworks that focus resources on the most critical problems in priority watersheds

- States, Territories and Tribes that undertake watershed management should convene teams comprised of individuals from all affected governments, communities, and the private sector. Each team would define environmental objectives, identify causes of water ecosystem degradation, and develop and

implement Watershed Management Plans. Among other things, plans will contain voluntary and mandatory actions to reduce point and nonpoint source pollution, improve water quality, and protect and restore aquatic habitats.

- EPA, with other Federal agencies, will contribute guidance, technical and financial aid, and periodic review of State watershed management programs. These "designer partnerships" on a watershed basis will break the one-size-fits-all paradigm.

Authorize multi-purpose water grants for States that do watershed management, with flexibility and streamlined administrative requirements

- As an incentive for the watershed approach, the CWA should consolidate existing State grants into one multi-purpose water grant (excluding the SRF). States could manage Federal funds through a single workplan, insuring basic activities enabling States to shift funds to high priorities.

Expand SRF funding eligibility to a wider range of activities

- The SRF authorization expires this year. The Act should reauthorize the SRF and clarify that SRF eligibility is limited to municipalities, but should expand their project eligibility to include riparian habitat restoration in priority watersheds; control of all municipal pollution sources; and programs promoting water conservation and pollution prevention. Congress should streamline program requirements to reduce costs.

BUILDING STATE AND LOCAL CAPACITY

The Administration recognizes that we can solve our water quality problems only with the synergism of partnerships throughout the Nation. Pooling our skills and resources, we will maximize environmental and economic benefits. Reauthorization of the CWA is a timely opportunity to spur national policy towards designer partnerships, empowered to try collaborative solutions. Partnerships must also include strategies to help State and local governments surmount the financial challenges they face in achieving CWA goals.

As a part of this effort, EPA should substantially consult with and involve State and local governments which are co-regulators in the relevant regulatory and other decision-making processes under the CWA. This clean water initiative creates a statutory environment in which that consultation and involvement can occur. Specifically, the Clinton initiative will:

Building on a Clean Air Act idea, help States collect sufficient clean water program funds through permit fees and other means

- States must adequately fund authorized programs through State appropriations, other funding, or permit fees to recover the costs of the NPDES, pretreatment and sludge programs. EPA should be authorized to collect the fee if the State does not collect sufficient funds, and wherever EPA operates the NPDES program. Funding should cover the costs of developing and administering point source regulations, standards, guidance, and permits; monitoring compliance and quality assurance; ambient monitoring; developing and maintaining an inventory of regulated entities; and developing and administering any fee system.

- Increased permit fees should also be imposed when the Army Corps of Engineers or authorized States issue Section 404 permits. These fees would recover program costs, enhance program efficiency and facilitate wetland protection. Fees should minimize financial effects on small landowners.

Capitalize the SRF to ensure its long term integrity, and streamline the SRF administrative process

- The SRF has been crucial to improving municipal sewage treatment. The Administration proposes authorization levels of $2 billion per year through 1998, then falling until 2003 as SRF annual repayments reach a stable level of about $2 billion.

Support Indian Tribes which seek to develop and administer integrated water quality programs

- The CWA should foster assumption of water quality programs by Indian Tribes. EPA should be authorized to provide a broad program grant for Tribes to develop "integrated" water quality programs tailored to their specific needs, and boost to 1% Tribal set-asides in Title VI treatment works construction funding.

FOSTERING ENVIRONMENTAL JUSTICE

The Clinton initiative recommends CWA changes to enhance protection of all the people from environmental hazards. It will:

Allow States to use the SRF for disadvantaged community needs

- While the long-term integrity of the SRF must be preserved, the Administration also believes that some disadvantaged communities, small or large, need

particular help. We propose to allow States to use up to 10% of each year's loan volume for negative interest loans (down to -2%), or similar assistance. This aid should be given only if a community demonstrates that it cannot meet the State affordability criteria even after exhausting all other options for financial assistance.

Improve quality of life for all, regardless of ethnicity, race or income, leaving no group bearing a disproportionate burden of the consequences of environmental pollution

- When setting CWA program priorities, EPA must involve the public to ensure consideration of all population groups. EPA should be authorized to develop guidance on fish advisories to ensure protection of people in cultural groups who consume more fish than the national average, such as subsistence fishers.

- Also, the new framework for watershed management proposed here would advance consideration of critical problems in priority watersheds regardless of race, ethnicity or income. Watershed activities should engage all affected groups, empowering local communities through partnerships. Particularly, the CWA should give urban watersheds high priority, and authorize SRF use for riparian restoration in such watersheds.

CHAPTER 1--FUNDING ISSUES

EXPANDING ELIGIBILITY FOR SRF FUNDING

ISSUE:

Under current law, a State Revolving Fund (SRF) established under title VI of the Clean Water Act (CWA) can provide assistance for the construction of publicly-owned treatment works (POTWs) [§212], the implementation of State NPS management programs (§319), and the development and implementation of estuary conservation and management plans (§320). The range of eligible activities under the current program is already fairly broad, and includes certain high-priority activities such as CSO abatement and storm water management. Since the program's inception in 1987, the issue of whether to expand the types of projects and activities eligible for SRF assistance has received a great deal of consideration.

BACKGROUND:

In recent years, the Administration's understanding of the types of impairments to the Nation's waterways and their costs, has improved. The Administration has examined a variety of proposals for expanding eligibility under the SRF program. These proposals range from clarifying and expanding eligible activities related to water quality management to transforming the program into a comprehensive mechanism for addressing a broader range of environmental management issues.

Unfortunately, the needs for currently eligible activities far exceed available SRF capitalization. In addition, Federal budget realities restrict our options. Moreover, many projects and activities proposed for funding under the SRF program are already eligible to receive assistance from other sources of Federal funding. For example, coastal NPS plans are eligible for grants under the Coastal Zone Management Act.

RECOMMENDATIONS:

- The Administration recommends small but significant changes to eligibility under the SRF program that would make the best use of limited Federal funds and encourage States[1] to address high priority needs.

- Restoration and protection of riparian areas in the context of a publicly-administered program should be eligible for SRF assistance. However, this would not include the purchase of land.

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[1]Throughout this document, "States" means all States, Territories, and eligible Tribes, as appropriate.

- Initial capitalization of a wetlands mitigation bank should be eligible for SRF assistance.

- SRF eligibility should be expanded to include development and implementation of water use efficiency activities if the activities are cost-effective alternatives to expanding treatment capacity for treatment works which are publicly-owned or managed (for example, measures undertaken by assistance recipients to install water saving plumbing fixtures). SRF assistance for such activities should be restricted to systems and be provided to the agency or entity operating a system, not to individual users. States should be encouraged to provide incentives to SRF loan applicants to undertake comprehensive water use efficiency studies and incorporate implementation of those recommendations in SRF funding proposals.

- SRF eligibility should also be available to public authorities to develop and implement pollution prevention plans.

- Section 201(g)(1) should be modified to remove the restriction on funding of CSO corrections, storm water controls, and sewer rehabilitation. The current restriction for collector sewers (20 percent of the capitalization grant amount) should remain.

- SRF should not be used to replace other Federal funds.

CLARIFYING AND LIMITING THE ELIGIBILITY OF CERTAIN ACTIVITIES FOR SRF FUNDING

ISSUE:

During the current phase of SRF program implementation, a series of issues has arisen regarding the appropriateness of providing SRF assistance for certain kinds of activities. A number of issues also have arisen with respect to the eligibility of various private parties to receive SRF assistance. As a result, the Administration has considered whether SRF-eligible activities should be limited in some way based on the purposes, benefits, or ownership (i.e., public vs. private) of such activities.

BACKGROUND:

Currently, funding of NPS management activities under the SRF is relatively unlimited. Based on our interpretation of title VI and its legislative history, the Administration has concluded that any activity that is included in a State's federally-approved §319 plan is eligible for SRF assistance regardless of relative priority among other projects in the State or the project's contribution to achieving water quality or public health objectives. In some cases, while a particular project would provide water quality improvement, that purpose may be secondary to other project purposes.

The eligibility of various private parties to receive SRF assistance has emerged as an issue most prominently in recent years, with the completion of NPS management plans and the movement away from a sole focus on traditional POTWs. Consequently, the Administration has questioned whether to limit SRF-eligible activities in some way based on ownership (i.e., public versus private).

RECOMMENDATIONS:

- The Administration favors restricting eligibility for SRF assistance only to municipalities. However, the Administration recommends that the CWA be amended at §603 to clarify that SRF assistance may be provided to an eligible public recipient for the publicly-owned portion of a municipal wastewater facility constructed as part of a public-private partnership arrangement.

- The Administration favors restricting eligibility to projects whose principal purpose is directly related to surface water quality improvement, as defined by chemical, physical, and biological parameters.

MODIFYING PROJECT REQUIREMENTS

ISSUE:

Title VI applies certain requirements to SRF-funded projects and activities. However, many small communities cannot take advantage of the SRF because of excessively burdensome requirements. States and local communities have urged that certain requirements be eliminated or modified to make the program more attractive, particularly for small or disadvantaged communities. Consequently, the Administration has considered whether some requirements should be altered.

BACKGROUND:

Most of the requirements that apply to SRF-funded projects are found in §602(b)(6) of the CWA. However, §602(b)(6) requires POTW projects that are assisted with SRF funds "directly made available by" capitalization grants (i.e., funds in an amount equaling the Federal contribution) to comply with certain requirements of title II. These requirements (known as "title II requirements") include requirements to consider alternative technologies, recreational uses, and value engineering, for example.

According to State and local officials, the title II requirements increase project and State administrative costs and impede decision-making flexibility. These requirements are particularly burdensome to small communities. In addition, these requirements can delay the time when Federal funds can be expended for these projects.

Certain title II requirements currently applicable in the SRF program represent good management practices that States and localities should follow (e.g, cost-effectiveness analysis, one-year operational certification, development of user charge systems, and compliance with the National Environmental Policy Act). The rationale for certain other title II requirements, although valid in a program of direct grant assistance to local communities, may not be as necessary when the assistance is in the form of loans from States.

RECOMMENDATIONS:

The Administration does not support exempting the SRF program from compliance with Federal cross-cutting requirements; however, certain requirements should be altered or added as follows:

- Environmental equity is an important concern for the Administration. Recipients of funds directly made available by capitalization grants for wastewater treatment project construction should be required to examine whether the siting of these facilities will have a disproportionate impact on people of color and low-income communities.

- As discussed under the section on expanding eligibilities, remove the title II restriction on funding of CSO corrections, storm water controls, and sewer rehabilitation.

- To relieve cost burdens, communities with populations under 10,000, should be exempted from complying with:
  - The §201(g)(2) requirement regarding consideration of alternative technologies;
  - The §201(g)(5) requirement regarding consideration of innovative and alternative technologies;
  - The §201(g)(6) requirement regarding consideration of open space/recreation; and,
  - The §201(o) requirement regarding encouragement of development of capital financing plans.

- Section 211, which limits funding for collector sewers to those in an "existing community," should be amended to make it clear that "existing community" refers to a community in existence as of the date of enactment of CWA reauthorization. Although the term "existing community" is not presently defined in the statute, it is interpreted to mean the date of original enactment of the CWA in 1972.

- Section 218 should be amended to require value-engineering reviews only for projects with total costs over $25 million.

- Any changes in the applicability of the title II requirements should apply to all capitalization grant funds for which binding commitments had not yet been executed as of the date of enactment of the CWA amendments.

- SRF projects and activities that are located in a State-designated watershed planning area should not be inconsistent with State-approved watershed management plans. (See discussion of watershed management.)

PROJECT TARGETING AND PRIORITY SETTING

ISSUE:

Should changes be made to encourage better project targeting of SRF funds?

BACKGROUND:

States have structured a wide variety of programs that direct SRF assistance to different priorities and projects. In some States, SRF loans primarily go to large cities; other States emphasize assistance to small towns. Most States provide the majority of funding to wastewater treatment works; a few are attempting to protect water quality by funding NPS projects.

Under the current SRF program, States must develop project priority lists (PPLs) *only for municipal wastewater facilities*. To be funded under the SRF program, municipal wastewater facilities must be on the State PPL; however, unlike the construction grants program, the State need not fund such projects in priority order. Title VI does not require the States to develop priority lists for other SRF-eligible activities. Without a means to consider the relative environmental benefits of various water quality approaches, most States have not given appropriate consideration to a full range of water quality management approaches.

Title VI also includes a requirement for each State to annually develop an Intended Use Plan (IUP) including a discussion of the SRF's short and long-term goals and objectives and the basis for selection of projects.

In addition, an expansion of the priority systems and project priority lists could foster more comprehensive water quality management and selection of projects based upon water quality assessments and comparative environmental benefits and costs.

RECOMMENDATIONS:

- Because funds available for SRF capitalization are limited compared to needs, it is important that States effectively set priorities and target assistance to direct the Nation's capital towards achieving the greatest environmental results. Therefore, the Administration recommends expanding priority systems and project priority lists to include all SRF-eligible projects, including NPS and estuary protection activities.

- State priority systems should reflect project contributions to implementing recommendations in State-approved watershed management plans. (See the discussion of the Administration's proposal for a new CWA provision to establish State-wide programs for comprehensive watershed management.)

- The current emphasis on State flexibility for funding water quality protection through the SRF program should be maintained. The Administration does not support the use of set-asides to foster funding of particular activities which are eligible for SRF funding. However, at their option, States should be allowed to establish dedicated pools within overall priority list for particular high-priority purposes, such as NPS activities.

MEETING THE NEEDS OF DISADVANTAGED COMMUNITIES

ISSUE:

There are many communities that cannot afford to repay SRF loans even at zero percent interest. These communities are not well served by other sources of financing because of their limited credit-worthiness. Projects in small communities and large scale CSO projects are often very expensive on a per capita basis. The Administration has considered a host of proposals for fundamental changes to the SRF to meet the needs of disadvantaged communities.

BACKGROUND:

Under the current SRF program, States may provide loans to communities with interest rates ranging from zero percent to market rates. Interest rate policies vary widely among the States. In addition, many States have prescribed criteria for providing various loan terms to communities dependent on need. States must strike a balance between providing attractive and affordable loan terms while, at the same time, managing the fund to provide a source of long-term financing.

Many States and groups that represent small and economically disadvantaged communities have recommended that certain changes be made to the SRF program which would enable States to provide more affordable financial assistance. Note that not all small communities are disadvantaged and not all disadvantaged communities are small. However, most of the disadvantaged communities are under 10,000 in population. These communities cannot rely on "economies of scale" and have less access to credit markets than large cities.

The Administration has considered several other financing approaches for disadvantaged communities, including: extending loan repayments to 30 years, but not to exceed the useful life of the facility (title VI currently limits repayment to 20 years); authorizing principal write-downs or negative interest loans; authorizing States to make grants under very limited circumstances; and, allowing States to use up to one percent of the Federal capitalization grant to provide technical assistance to small and other disadvantaged communities to help identify low cost technologies, prepare application materials, and consider other financing options.

RECOMMENDATIONS:

The Rural Development Administration (RDA) provides loan and grant assistance to communities with populations under 10,000. The Administration and States should improve coordination between the SRF and RDA programs to assure selection of projects based on relative financial need, environmental benefits and other factors and, as appropriate, promote combinations of grant

and loan assistance to most effectively use available funding sources and to provide local communities with a broader range of funding choices.

- States should be authorized to provide additional subsidies from the SRF to disadvantaged communities through a joint prioritization and coordination process between States and RDA for communities with a population less than 10,000. The value of these subsidies should be limited to ten percent of the value of loans made in a particular year.

- Some States already manage separate loan and grant programs targeted to meet the needs of small and disadvantaged communities. Other States should be encouraged to set up similar programs parallel to, but outside of, the SRF so that the long-term purchasing power of the SRF is not eroded.

- States should determine which communities qualify for special subsidies, based on guidelines established by EPA. Subsidies could include negative interest rate loans, 30-year repayment periods (or repayment periods that do not exceed the life of the facility), principal subsidies, loan forgiveness and similar methods proposed by the States and approved by EPA.

- Any additional subsidy provided to a disadvantaged community should not exceed the amount necessary to make the SRF loan affordable, and the amount of the subsidy to any qualifying community should not exceed the equivalent of a negative 2 percent interest rate. Such additional assistance should be available only to qualifying communities that demonstrate that no Federal or State grant funds are available for their project and that such additional assistance is necessary to make the project affordable.

- §604(b) should be amended to authorize States to use the set-aside of one percent of the State title VI allotment for technical assistance to needy communities.

- Congress has recognized that the SRF program may not be an ideal approach for certain specific jurisdictions, and has provided relief in appropriations acts by directing EPA to set-aside one-half of one percent of the total title VI appropriation for grants to Indian Tribes (including Alaska Native Villages) for the construction of municipal wastewater facilities. The Administration believes that the set-aside should be included directly in the authorizing language and that the amount should be increased to one percent. Grants should be allowed to cover 100 percent of project costs. Up to 4 percent of funds available under this set-aside should be available for use to administer such grants.

- Appropriations language has also exempted the District of Columbia, Virgin Islands, Guam, and certain other territories from the SRF program. Instead, these jurisdictions receive their title VI allotments in the form of grants under title II. The Administration supports continuation of this exemption through incorporation into the authorizing language. These jurisdictions should be allowed to use these funds for any SRF-eligible activities.

CAPITALIZATION OPTIONS FOR SRF PROGRAM

ISSUE:

Federal capitalization of the SRF program is scheduled to end in 1994, but the remaining needs for currently eligible wastewater treatment projects and activities are enormous. Because of the success of the program and the size of the remaining needs, there appears to be strong support for providing additional Federal funds to the States. The Administration has been examining the changes that are needed to assure the long-term financial health of the SRF program, including additional capitalization beyond Federal authorizations contemplated by the currently proposed authorization period.

BACKGROUND:

The recently-released 1992 Needs Survey provides an estimate of the costs to build municipal wastewater facilities, including CSO abatement and storm water management, as well as certain NPS management activities. The total estimated cost, including both documented and modeled needs, is approximately $137 billion. If eligible activities are expanded, the total potential demand for SRF funding could increase even further.

Based on the current SRF program (including assumptions about additional capitalization resulting from leverage bonds), the Agency estimates that over a 20-year period States will provide SRF loans at a total value of approximately two and a half times the initial Federal capitalization. Nonetheless, without additional capitalization, there will likely be a major gap between available SRF funds and the demand for local financial assistance.

Part of the discussion of future capitalization of the fund hinges upon consideration of the appropriate role of the Federal government in supporting local communities and States in addressing water quality infrastructure needs.

Even with the additional capitalization of the SRF program proposed by the President, the gap between the cost for communities of complying with the CWA and the resources available from Federal assistance programs and other public funding will remain vast. Many communities are looking to private capital to help fill the gap and many private firms and investors are anxious to loan the funds. However, impediments in both the CWA and EPA regulations prevent the public and private sectors from working together to meet the Nation's municipal wastewater needs.

RECOMMENDATIONS:

- For FY 1994, the Administration recommended an authorization of $1.2 billion for the SRF. From FY 1995-1998, the authorization should increase to $2 billion annually.

- In order to maintain the ability of States to obtain $2 billion in annual loan activity (including rollover of repayments) and to buttress the disadvantaged community program, $1.5 billion should be authorized for the program for FY 1999, $1.25 billion for FY 2000, $1 billion for FY 2001, $0.75 billion for FY 2002, $0.5 billion for FY 2003, and $0.25 billion for FY 2004. Federal capitalization should end at that point.

- States should be authorized to use an amount equal to up to 4 percent of the capitalization grants or up to 1/2 percent of the cumulative capitalization (Federal grants and State match) for the costs of fund administration.

- States should be authorized to deposit loan closing fees and loan repayment surcharges into their SRF and to earmark those funds for administrative expenses or technical assistance to disadvantaged communities (such amounts cannot now be used for such purposes because of the four percent cap on administrative expenses calculated on the amount of Federal capitalization grants).

- Statutory impediments to private investment in municipal wastewater facilities should be removed. The Administration recommends defining the phrase "publicly-owned treatment works" in the CWA to include, for non-financing purposes, wastewater facilities that serve the general public, regardless of ownership structure. The purpose of this provision would be to establish equitable permitting and other technical consideration of publicly-owned and investor-owned sewage facilities. (This is analogous to "public water supply" under the SDWA which refers to the facilities that serve the public, not facilities that are necessarily owned by public entities.) Legislative language should be constructed to ensure that private entities would not be eligible for SRF assistance. However, as recommended separately by the Administration, the CWA should clarify that SRF assistance may be provided to the public portion of municipal wastewater facilities that benefit from public-private partnership arrangements.

- States should continue to provide a 20 percent match to the Federal capitalization grants.

PERMIT FEES FOR THE NPDES, PRETREATMENT, AND SLUDGE PROGRAMS

ISSUE:

Should permit fees be specifically authorized in the CWA to fund the National Pollutant Discharge Elimination System (NPDES), pretreatment, and sludge programs?

BACKGROUND:

Currently, funding of the NPDES, pretreatment, and sludge programs at the Federal and State levels is insufficient to fully implement legislative mandates. In the future, fiscal difficulties will necessitate reduced funding. At the same time, EPA and the States are expected to consider advances in technology and scientific knowledge in decision-making at all levels, and to draw upon a wider base of controls to prevent pollution and multi-media pollution transfer. Permit fees have been suggested as a funding source worthy of consideration.

Existing Fee Systems

Many States have developed wastewater permit fee systems, but few are sufficient to bring current funding to adequate levels. Current State fee systems vary broadly in the amount of fee assessed and the schedule or formula used to determine the fee for an individual facility. The Federal government at this time has no fee system for water programs.

The Clean Air Act Amendments of 1990 (CAAA) required permit programs administered by any air pollution control agency to contain a permit fee system sufficient to cover all reasonable costs of developing and administering the permit program. The CAAA further authorized EPA to collect reasonable fees to cover the costs of administering the provisions of the permit program where the control agency has not met the requirements for a fee program or is not adequately administering or enforcing an approved fee program.

Potential Approach for CWA Permit Fees

An approach similar to that in the CAAA could be taken in the CWA. Specifically, the CWA could require EPA and the States to develop comprehensive fee systems to cover all or some fraction of their costs of developing and administering the NPDES, pretreatment, and sludge programs. These fee systems, alone or in combination with appropriated funds, program grants or other revenue systems, could cover, at a minimum, direct and indirect costs of developing and administering regulations, water quality standards, guidance, and permits programs; monitoring compliance and quality assurance; conducting ambient monitoring; processing waiver applications; developing

and maintaining an inventory of regulated entities; and developing and administering the fee system. Requiring collection of 100 percent of the program costs would eliminate the need to annually review State revenues available through the combination of fees, appropriations, and grants.

EPA, the States, and any Indian Tribes that obtain program authorization could be given broad authority to fashion their fee structures as they deem appropriate as long as those fees, in combination with other funding, are sufficient to cover program costs. EPA and the States may find the greatest benefit in simple fee structures which are easy to assess and inexpensive to implement. Fee structures that require extensive accounting could be avoided so that the cost of implementing the fee system would not wholly disproportionate to the fees collected. EPA, the States, and Indian Tribes could be given the authority to exempt certain dischargers from paying any or all of the fee--whether based on an incentives program or in recognition of economic or other factors.

RECOMMENDATIONS:

- Require authorized States and Tribes to develop and implement a fee system for the NPDES, pretreatment, and sludge programs they are authorized to administer. The requirement should be written to encourage national consistency and to assist the ability of States to adopt fee legislation.

- Authorize EPA to develop fee systems in authorized States and Tribes that do not develop approvable fee systems within a stated period of time or in States and Tribes that are not authorized to administer any or all of the NPDES, pretreatment, or sludge programs. These fees would only cover the costs to administer the NPDES, pretreatment, and sludge programs. These fees would be deposited in a special fund and be subject to appropriation.

- Specify that the fee systems be designed to assess fees of permittees and industrial users (IUs) that have been issued equivalent control mechanisms by the State (in the case of authorized States), Indian Tribe (in the case of authorized Tribes), or EPA.

- Require that fee systems for authorized States and Tribes be designed to collect, at a minimum, funds sufficient to cover 100 percent of the costs not funded through appropriated funds, program grants, or other revenue systems to develop and administer all aspects of the NPDES, pretreatment and sludge management programs, as well as other surface water programs (e.g., water quality standards, ambient monitoring, total maximum daily loads) which support the NPDES, pretreatment, and sludge programs.

- Extend broad authority to States, Tribes, and EPA to determine the basis of their fee structures. Although fee systems are designed to generate revenue with which to fund the program, States and Tribes should be encouraged to base fees on pollutant loading or other factors deemed appropriate to provide economic incentives to promote pollution prevention. These fees should not supplant any applicable technology-based or water quality-based effluent limit, or pollution prevention planning requirements of law.

- In the event accumulated fees exceed the amount required above, authorize the reduction or suspension of fees sufficient to prevent accumulation in excess of program needs.

- Require that the fee systems be re-evaluated every 5 years to determine the adequacy of established fee systems given changes in the Producer Price Index as well as changing requirements for the implementation and administration of the NPDES, pretreatment, and sludge programs.

SECTION 404 PERMIT FEES

ISSUE:

Should permit fees be explicitly authorized in the CWA to fund the Section 404 program?

BACKGROUND:

Since the early 1970s, the Army Corps of Engineers (COE or the Corps) has charged Section 404 permit fees of $10 for private projects. All monies collected are deposited in the U.S. Treasury. In 1990, following completion of a Corps study and upon the recommendation of the Department of Defense Inspector General, the Corps published for public comment a proposed revised fee schedule. The proposal would have increased application fees, based upon the associated government permit evaluation costs, to $2,000 for commercial projects and $500 for noncommercial projects. A fee schedule also was proposed for other services such as wetlands delineations and environmental impact statement preparation.

The proposed revised Section 404 fee schedule proved to be very controversial, and Congress, in both the 1992 and 1993 Corps appropriations bills, expressly prohibited the Corps from expending any funds on completion of the proposed fee regulations.

Since that time, the Vice President's National Performance Review has been completed. The final report explicitly addresses existing Section 404 permit fees and states that the Corps "has charged only token fees for its services, collecting only $400,000 annually." The report goes on to recommend that, "higher fees would help not only taxpayers but Corps customers, because additional revenues could pay for faster processing of applications."

RECOMMENDATION:

The Administration recommends that the CWA be amended to establish a fee structure for Section 404 permit fees for major regulatory actions, and that the monies generated from the fees be placed in a special regulatory account and used by Corps districts (and assumed States, as appropriate) solely to increase the efficiency and effectiveness of the regulatory program by reducing delays associated with permit evaluations and wetlands delineations. This fund would operate independently from the Corps' normal regulatory operating budget.

LABORATORY PERFORMANCE EVALUATION FEES

ISSUE:

Should user fees be specifically authorized in the CWA to recover the cost for preparing and distributing laboratory performance evaluation standards and materials laboratories and NPDES permittees?

BACKGROUND:

The quality and reliability of data used to implement water programs at the Federal, Regional, and State level is critical to the success of EPA Programs. The Water Laboratory Performance Evaluation Program, consisting of three separate performance evaluation (PE) studies, is one of several tools to ensure the quality of monitoring data required under the CWA. These laboratory PE studies are valuable indicators of whether laboratories have the equipment and technical ability to accurately analyze monitoring samples required under the CWA. Laboratories and NPDES permittees are encouraged or required by regulation to participate in PE studies.

EPA currently provides performance evaluation materials to 5,000 Federal, State and private laboratories and 7,500 permittees at no cost to the users. Over half the States require commercial laboratories to participate in EPA Performance Evaluation program to receive certification to analyze wastewater samples under the National Pollution Discharge Elimination Program. Many States not using EPA performance evaluation studies for certification, do use results of the studies to identify laboratories with performance problems and to set priorities for laboratory audits. The results of PE studies are also used as by States to make certification decisions for other environmental programs.

The cost for preparing and distributing water PE materials to users regulated under the CWA was approximately $1.5 million dollars and 6 work-years in 1992. Costs are expected to be $1.6 million in 1993. This level of funding provides a minimal program that does not meet all current or future programmatic needs, because the EPA budget for the program is not keeping pace with the increase in size, scope, and cost of the studies necessitated by new programmatic demands.

As the emphasis in monitoring shifts to measure biological and ecosystem health and new programs for cleanup and control of contaminated sludge are implemented, PE materials and studies that test laboratories' abilities to measure a wider range of analytes in more complex matrices--such as fish and animal tissue, sediment, and sludge--will be necessary. Thus the costs for administering studies will continue to grow at a time of continuing funding shortages in Office of Water and Office of Research and Development. If funding does not increase EPA will not be able to sustain the current program or make changes to address new needs.

RECOMMENDATIONS:

- EPA should be authorized to collect and retain user charges to generate a sum of funds equal to the cost for EPA to administer and implement a program for distributing laboratory performance evaluation standards and materials to laboratories and permittees implementing requirements under the CWA.

- The laboratory performance evaluation fee structure should reflect EPA's costs for given categories of users or activities and should approximate EPA expenditures for each.

- A fund should be maintained to specifically replenish inventories and performance evaluation materials to users. The fund should not exceed the annual costs for administering and implementing the program by more than five percent.

CHAPTER 2--TOXICS ISSUES

POLLUTANT DISCHARGE PROHIBITIONS

ISSUE:

What changes are needed in the CWA to improve the ability to prohibit the discharge of the most detrimental toxic pollutants?

BACKGROUND:

Significant progress has been made in decreasing the discharge of harmful toxic pollutants to surface waters. This has largely resulted from technology and water quality based controls on point sources. Nonetheless, the discharge of certain toxic pollutants continues to contribute to serious environmental and human health water quality problems. Such problems are evident in the inventories of impaired waterbodies, the toxic contamination of sediments, and contamination-based fishing bans and advisories.

Some pollutants are extremely harmful in small quantities and/or build up in the food chain to produce adverse and long-term effects to human health and the environment. Emerging evidence links certain pollutants not only to cancer, but also to neurological, reproductive, developmental and immunological adverse effects. Such pollutants can damage aquatic ecosystems by directly eliminating sensitive species or indirectly causing increased incidence of disease in the remaining species. Some pollutants may also persist in the environment for decades, posing a continuing threat to humans, aquatic organisms, birds and other wildlife.

The CWA's technology-based effluent guidelines-to-NPDES permits process and the complementary water quality criteria/standards-to-NPDES permits approach are still the best mechanisms for EPA and the States to control the discharge of most toxic pollutants into surface waters. However, both approaches can be very time-consuming and costly. Developing an effluent guideline may take 5 to 6 years or more, with costs ranging from $5 to $8 million. Water quality criteria may take 3 to 5 years to develop, with costs ranging from $300,000 to $800,000 per pollutant for chemical-specific criteria. It took 13 years before all States adopted or EPA promulgated water quality standards for priority toxic pollutants with §304(a) criteria. Translation of these requirements into permit limits takes more data and additional years.

§307(a)(2) authorizes EPA to issue an "effluent standard" (which may include a prohibition) establishing requirements for toxic pollutants. However, the statute mandates a burdensome rulemaking process that is more formal than the widely used Administrative Procedure Act informal rulemaking requirements found in 5 U.S.C.

553. The procedures pertaining to §307(a)(2) include: cross examining witnesses during a public hearing presided over by an Administrative Law Judge; maintaining a verbatim record of the hearing to be made available to the public; and, requiring EPA to base the decision on "substantial evidence" in the record (rather than considering public comments and meeting an "arbitrary and capricious" standard). This cumbersome process has rarely been used. The most recent use of the §307(a)(2) process was 17 years ago (January 12, 1977, 42 FR 2613; Feb. 2, 1977, 42 FR 6555; 40 CFR Part 129) when EPA published effluent standards for aldrin/dieldrin, DDT, DDD and DDE, endrin, toxaphene, benzidine and polychlorinated biphenyls.

RECOMMENDATIONS:

- The Administration recommends that the CWA be amended to improve the ability, where needed, to restrict or prohibit the discharge of the most highly toxic and highly bioaccumulative pollutants. In making such determinations, EPA should use general informal rulemaking procedures to ensure all credible issues are addressed, but also to ensure timely implementation. Although discharge prohibitions are only needed for a few of the very "worst actor" pollutants, such restrictions or prohibitions would be important steps towards the CWA's "zero discharge" goal.

Administrative Procedures

- The administrative procedures in §307(a) should be amended to authorize EPA's use of the rulemaking procedures in 5 U.S.C. 553 when establishing an effluent standard to restrict or prohibit the discharge of a toxic pollutant. After a 90-day public comment period, consultation with affected federal agencies, and consideration of relevant matter presented, EPA should make a final determination as expeditiously as practicable. The basis of judicial review should be the "arbitrary and capricious" standard in 5 U.S.C. 706(2)(A).

Discharge Prohibitions

- Section 307(a)(2) should be amended to revise and clarify the basis for an effluent standard that restricts or prohibits the discharge of the most highly toxic and highly bioaccumulative pollutants that pose a substantial risk to human health or to the chemical, physical, or biological integrity of the Nation's waters. The discharge requirements should be based upon the best available scientific information on: (1) the pollutant's persistence, toxicity, and bioaccumulation potential; (2) the magnitude and extent of exposure to the pollutant; (3) the relative contribution of point source discharges of the pollutant to the overall risk; (4) the availability of and risk posed by substitute chemicals or processes or the availability of treatment processes or control technology; (5) the beneficial and adverse social and economic effects of any

effluent standard, including the impact on energy resources; (6) the extent to which effective control is being or may be achieved in an expeditious manner under other regulatory authorities; (7) the impact on national security interests; and (8) other factors EPA deems appropriate.

- EPA will consult with the federal resource agencies and other applicable federal agencies in rulemaking for pollutant discharge prohibitions.

- EPA should have the authority to determine the scope of an effluent standard, including the ability to apply it to certain classes or categories of dischargers.

- EPA's authority under this provision should be applicable to all toxic pollutants as defined in §502(13) of the CWA, rather than the narrower list of priority pollutants.

- EPA should use the discretionary authority in existing statutes to regulate or prohibit multi-media environmental releases that cause or contribute to a water quality impairment. The Administration wants to work with Congress to develop approaches that would allow effective pollution control where other Federal environmental statutes are not effective, and where an integrated multi-media approach is the most efficient means to reduce unacceptable risk. This would not apply to mobile sources or pesticide programs. EPA would use the most appropriate existing environmental statute (e.g., the Clean Air Act for air releases) for controlling the release and would take into account the factors of revised section 307(a)(2) above.

- Any person should be able to petition the Administrator to exercise the discretionary authority to regulate or prohibit multi-media environmental releases of pollutants or classes of pollutants which contribute to a water quality impairment.

    - o When submitting a petition, the submitter should include any information on the factors outlined for 307(a)(2).

    - o Within twelve months following receipt of the petition, the Administrator should (1) deny the petition based on the information submitted as supplemented with other information available to the Administrator, or (2) after public comment, publish a plan to initiate rulemaking to restrict multi-media releases, including prohibition of releases. In making this decision, the Administrator shall consider the factors outlined for 307(a)(2).

    - o If the Administrator finds there is insufficient information to grant or deny a petition, the Administrator should require additional information

within 6 months of the petition being received. Following an appropriate period for submission of additional information, the Administrator should grant or deny the petition within 6 months.

- o The Administrator should be required to respond to the petition within the schedule outlined above, except if the Administrator has received petitions for multiple pollutants, the Administrator may select which petitions to address first, and should then develop a plan for addressing the remaining petitions.

- o The Administrator should have the discretion to form classes of compounds to expedite review and decisions on any petition.

► The pollutants or group of pollutants for which EPA should establish a restriction or prohibition should not be specified in the statute. Further, the statute should not specify deadlines for making any such determinations. Such determinations will vary from pollutant to pollutant. Ensuring that they are based upon sound science argues in favor of relying upon EPA's scientific expertise.

Timing

► As part of any effluent standard, EPA should establish the effective date for the discharge prohibition.

Study of Chlorine and Chlorinated Compounds

► To develop a strategy to comprehensively protect human health and the environment and to move towards the national goal of the Clean Water Act of eliminating the discharge of toxic pollutants, the Administration will develop a national strategy for substituting, reducing, or prohibiting the use of chlorine and chlorinated compounds:

- o Within 6 months following enactment, the Administrator should convene a task force which includes representation by appropriate federal agencies including, at a minimum, NIEHS, ATSDR, FWS and NMFS, and other experts outside of the federal government to comprehensively assess the use, environmental and health impacts of chlorine and chlorinated compounds, and availability and relative efficacy and safety of substitutes for these substances as used in publicly owned treatment works and drinking water systems, and solvents, PVC and other plastics, and in pulp and paper manufacturing. This task force should identify which chlorinated compounds or classes of chlorinated

compounds should be examined and develop a study building upon existing Agency studies and actions where appropriate.

- Within 18 months following enactment, the task force should collect all current information on the use, and environmental and health impacts of chlorine and chlorinated compounds associated with the uses listed above, and the availability and relative efficacy and safety of potential substitutes. In considering environmental and health impacts of chlorine, chlorinated compounds, and their potential substitutes, the task force should include the potential developmental impacts on aquatic species, wildlife, and humans, including but not limited to impairments to the reproductive, endocrine, immune, and nervous system functions.

- Within 30 months following enactment, the Administrator should:
  (1) Review the information collected by the task force;
  (2) Develop a plan for any appropriate actions, including the exercise of existing statutory authorities, to restrict or prohibit the use of chlorine or chlorinated compounds, in consideration of the environmental and health impacts, and availability and relative safety and efficacy of potential substitutes;
  3) Subject the plan to public comment; and
  4) Release a final national strategy for substituting, reducing, or prohibiting the use of chlorine or chlorinated compounds.

  In formulating this action plan, the Administrator should consider the discretionary authority to reduce or prohibit multi-media environmental releases which contribute to a water quality impairments.

- Within three years of enactment, the National Academy of Science should complete a study for the Congress on the current knowledge of chemicals that exhibit endocrine, immune, and nervous system health effects in humans and wildlife, including evidence that they increase the incidence of breast cancer, decreased sperm count, or impaired reproduction. The study should include recommendations for any appropriate actions which are based upon scientifically defensible findings for reducing or prohibiting the production and/or use of such chemicals.

WATER QUALITY CRITERIA DEVELOPMENT

ISSUE:

How can the CWA be amended to promote priority-setting based upon maximizing risk reduction in the development of §304(a) water quality criteria?

BACKGROUND:

The central challenge of the water quality criteria program is that the development of criteria, methodology and guidance far exceeds any reasonable resource expectations. The CWA provides EPA adequate authority to develop all types of water quality criteria (chemical, physical and biological), methodologies and guidance. However, there is no statutory requirement to set priorities among these competing demands based on maximum risk reduction potential and programmatic effectiveness.

In the 1970's and early 1980's, EPA focused water quality criteria development to address a relatively narrow subset of all water quality problems. Efforts emphasized chemical-specific numeric criteria to protect aquatic life or human health because: (1) chemical contaminants were associated with priority problems; (2) the current statute targeted point source dischargers; and (3) our scientific knowledge was the most advanced in this area.

Since the mid-1980's, research and criteria development efforts have expanded beyond focusing on chemicals to address the full range of ecological problems. For example, these efforts include work on biological, wildlife, sediment, nutrient, and habitat criteria. This shift in focus of research and criteria development is consistent with the 1990 report of EPA's Science Advisory Board: *Reducing Risk: Setting Priorities And Strategies for Environmental Protection*. This report recommended that EPA attach as much importance to reducing ecological risk as it does to reducing human health risks. Further, the 1992 National Water Quality Inventory data on the leading causes of waterbody impairments supported a focus on ecological problems.

In focusing on ecological problems, environmental equity considerations cannot be ignored. For example, contaminated fish may pose higher risks to sensitive subpopulations, including pregnant women, native and ethnic subsistence fishers, and those with compromised immune systems. Although States have issued fish advisories in approximately 1300 waterbodies to limit public consumption of contaminated fish or shellfish, there is inconsistency in the development of fish advisories, the information contained in them, or the way susceptible populations are informed of the risks.

Thus, while some chemical pollutants still contribute to serious water quality problems, due to scientific advancements, the changing nature of water quality

problems and their relative seriousness, and the considerable progress in the control of point source discharges, the need for other forms of criteria, methodologies and guidance has increased. To meet new challenges, we need a comprehensive set of criteria, methodologies and guidance to accurately assess the water quality aspects of ecosystem health and support efforts to maintain and restore waterbody integrity.

RECOMMENDATIONS:

- The Administration proposes that EPA should develop criteria and implementation guidance based on the most current science, and should have explicit authority to set priorities for developing such criteria based on risk and effectiveness. EPA needs the flexibility to be responsive to changes in science and understanding of our environmental problems. Statutory requirements to develop specific water quality criteria or types of criteria on tight deadlines would hamper EPA's ability to set priorities based upon a comparative risk reduction determination and understanding of relationships within an ecosystem. Such statutory requirements would fragment resources, time and attention among relatively minor risk areas.

Comprehensive Criteria Development Plan

- §304 should be amended to require EPA to develop, within two years of enactment, a comprehensive plan setting priorities for criteria development. EPA should involve States, Tribes, other Federal agencies, academia and the public in the development of the plan. Priorities for the development of all forms of water quality criteria, methodologies or guidance should reflect relative risk reduction potential and risk management considerations, including programmatic needs, effectiveness and societal effects. The plan should include provision for simultaneous development of regulations, policies, guidance, technical assistance, and training materials necessary to support timely implementation of the criteria. The plan should be implemented to the fullest extent possible based upon appropriated resources, and updated every five years.

- The statute should not specify the pollutants or types of criteria documents, nor should it set deadlines for their development. These determinations should be part of the comprehensive criteria development plan.

Improved Data Availability

- §308(a) should be amended to clarify that EPA is authorized to request from dischargers the data necessary to support the development of water quality criteria for pollutants found in the discharges.

- EPA should be given discretionary authority to require the submittal of sufficient information to establish the need for a criterion and, if needed, data to establish water quality criteria from manufacturers, registrants, formulators/packagers or re-packagers, as appropriate, of a pesticide registered or undergoing re-registration under the Federal Insecticide, Fungicide, and Rodenticide Act and from manufacturers or processors, as appropriate, of a chemical on the Toxics Substances Control Act inventory list or subject to a Premanufacturing Notice under the Toxics Substances Control Act.

Fish Advisories

- The statute should acknowledge and recognize the roles of EPA and FDA, after consulting with appropriate federal agencies, to develop factors and guidelines that States may use in issuing fish consumption advisories, including those that protect people in cultural groups who consume more fish than the average consumer.

Criteria Development Process

- The statute should require EPA to establish a process for the development of criteria, methodologies or guidance in which States, Tribes, other Federal agencies, academia, local governments, industry, environmental groups, and the public participate.

STATE WATER QUALITY STANDARDS REVIEWS

ISSUE:

Are CWA changes needed to improve the timeliness and scope of State adoption of EPA §304(a) water quality criteria and other State water quality standards uses and policies?

BACKGROUND:

CWA §303(c)(1) requires States to update water quality standards at least once every three years to ensure that: (1) waterbody uses reflect current conditions; (2) criteria are based on the best available science, and address emerging issues; and (3) policies, methods and practices are revised or modified to fully attain the goals of the Act. EPA reviews and approves or disapproves State water quality standards and any changes. EPA promulgates standards for a State if: (1) a State fails to make appropriate revisions in disapproved standards, or (2) a new or revised standard is needed to meet the requirements of the Act.

In practice, State reviews and updates of water quality standards have taken many years beyond the once-every-three-years statutory requirement. Such delays create serious impediments in developing control programs to restore and maintain our Nation's waters. For example, it took 13 years to get toxic pollutant criteria into all State standards. Despite this lengthy process, most States adopted standards identical to EPA's water quality criteria for most pollutants.

Further, EPA ultimately had to establish Federal standards for 14 States. EPA promulgation actions are resource-intensive and time-consuming. For example, the recently completed National Toxics Rule promulgation action took almost three years.

Aside from delaying the control of toxic discharges, this process has also diverted EPA and State attention and resources from other pressing program priorities (i.e., biological, habitat, and contaminated sediment criteria and standards). In States, the process has also stymied the adoption of narrative biological criteria and of wetland water quality standards.

The Act also provides as a goal under §101(a)(2) that wherever attainable, water quality should provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. Nonetheless, 21 years after the Act, some waters still lack use designations. This gap inhibits effective implementation of water pollution control programs.

With the exception of consultation with appropriate Federal agencies under the Endangered Species Act, Federal natural resource management agency involvement

in States' water quality standards reviews is often limited to the public hearing at the end of the process. Yet Federal technical expertise and environmental and ecological data could assist States during their reviews of water quality standards. A consolidated guidance document describing Federal natural resource management agencies' technical expertise, data and requirements, would enhance a State's ability to take advantage of the resources and information when they would be most advantageous.

As water quality programs move toward a watershed focus, the review and revision of waterbody use designations and implementation policies should be coordinated with those efforts. A pentennial review of water quality standards may be more consistent with the watershed planning focus and with the increasing complexity and site-specific or ecosystem nature of newer forms of water quality criteria (nutrient, salinity/flow, habitat, biological and toxicity criteria). Not only are the new forms of criteria more difficult and time-consuming to adopt, but their application may be different from chemical-specific criteria. To deal with this complexity, the §304(a) criteria documents could explicitly describe the scope and applicability of the criteria, e.g., using biological criteria initially as an assessment and evaluation tool to describe the condition of the water resource rather than the basis for a permit limit. Integrating the time frames of complementary water programs [§303(c), §303(d), §305(b), §314, §319, §320 and §402] would facilitate development, implementation and evaluation of water pollution control programs.

RECOMMENDATIONS:

- The CWA should be amended to improve compliance with the current statutory requirements for the review, update and adoption of enforceable water quality standards. The new statutory provisions should maintain the opportunity for State exercise of primacy and substantial flexibility, but should also ensure standards are in place in a timely fashion to avoid Federal promulgation actions or other administratively burdensome requirements. The statutory amendments should also promote the updating of waterbody uses in coordination with watershed focused efforts.

<u>Waterbody Use Designations</u>

- The CWA should require that all waters be evaluated for use designations. To achieve this objective, the CWA should be amended to provide that: not later than two years after enactment, all waters for which uses have not been designated, shall be designated to provide for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water, unless and until a State or authorized Tribe demonstrates that such uses are not attainable, and adopts an alternative use or uses that EPA approves in accordance with §303(c)(3).

Adoption of Pollutant-Specific Numeric Criteria

- Section 303 should be amended to require that if a State or authorized Tribe fails to adopt water quality standards that have been through formal rulemaking review three years after EPA publication of new or revised pollutant-specific numeric water quality criteria under §304(a) (including toxic criteria, bacteriological criteria and other criteria to protect aquatic life, human health, and wildlife), then the §304(a) criteria automatically become the State or Tribe water quality criteria regardless of use designation, unless and until the State or authorized Tribe adopts and EPA approves a revised water quality standard in accordance with §303(c)(3).

- The statute should require States, within three years of enactment, to adopt a scientifically defensible provision or methodology that allows the States, where sufficient data exist, to interpret a narrative water quality criterion to yield a numeric value. The provision or methodology would be used to derive a numeric value for those pollutants that cause water quality impairments and for which EPA has not published §304(a) criteria or for which criteria have not been made effective in the State. Such numeric values shall be used for all purposes under the Act for which the numeric criteria apply.

Adoption of Ecosystem-Specific Criteria (e.g., biological, habitat, nutrient)

- For those pollutants, factors or conditions requiring the collection and use of site-specific or ecosystem-specific data (e.g., biological, nutrient, habitat and other forms of ecological criteria), as specified in the §304(a) criteria document, the Act should require States to adopt and to apply those criteria for the purposes stipulated in the criteria document as expeditiously as practicable, but not later than four years after their publication in impaired or threatened waters. For States failing to act, EPA should either promulgate the applicable criteria under §303(c)(3) or take other appropriate action to facilitate State adoption of the criteria.

Comprehensive Water Quality Standards Reviews

- Rather than a triennial water quality standards review, the statute should provide for a pentennial review to reflect the changing focus, nature and complexity of the program. During the first pentennial review, States should conduct a comprehensive review of, and make appropriate revisions in, use designations, criteria and policies and submit the review and revisions to EPA. In some cases, States may have designated uses which are not attainable. After completing the use attainability analyses, States should make appropriate revisions to the use designations, consistent with fully protecting existing uses and maintaining the designation for those which are attainable.

- Section 303(e) should be amended to require that EPA transmit to States a coordinated guidance document compiled from the submissions of Federal resource management agencies. The coordinated guidance document should describe, on a State-by-State basis, Federal data and information on water quality related environmental considerations associated with maintaining and protecting the Federal interests in fishery resources, wildlife resources, threatened or endangered species and their critical habitat, federal lands, and other natural resources of federal interest affected by the quality of waters within the State. During the development, review, and modification of water quality standards, policies, and procedures, States should fully consider this data and information. EPA, in consultation with the Federal resource management agencies, should ensure that each State has given full consideration to this information and data before approving the State water quality standards.

ANTIDEGRADATION

ISSUE:

How should the CWA be amended to enhance the timeliness and level of antidegradation protection given to important waters?

BACKGROUND:

The antidegradation policy is critical to attaining the goals of the Act. Although the policy has been an essential element in the water quality standards program since 1968, the CWA does not specifically define a water quality standard to include an antidegradation policy, but references such policies in §303(d)(4)(B).

The Water Quality Standards Regulation (40 CFR §131.12) requires that States adopt a State-wide antidegradation policy and antidegradation methods to:

1. maintain and protect water quality necessary to protect the level of existing uses;

2. protect high-quality water (i.e., water quality that exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water), unless the State makes a finding that lowering water quality is necessary to accommodate important economic and social development in the area in which the waters are located;

3. maintain and protect waters which constitute an outstanding National resource, including waters of exceptional ecological or recreational significance.

Antidegradation involves a two-step process. The first step is a screening determination of whether an activity will lower the quality of the receiving water. The simple introduction of additional pollutants does not necessarily constitute a lowering of water quality. This screening determination involves a pollutant and site-specific scientific consideration of factors such as the type and amount of additional pollutants, and the duration and spatial extent of the change. Where an activity does lower water quality, it triggers the antidegradation review process.

Through the NPDES permit process, existing uses and high quality waters are protected. However, States have classified very few waters as Outstanding National Resources Waters (ONRWs). This is due in part to significant limitations on activities affecting the waters, as specified in EPA guidance once they are designated as ONRWs. Such limitations preclude new or increased loadings, except those that are minor and short term. An ONRW designation could also significantly affect

dischargers to upstream waters or prevent the expansion of visitor facilities in national or State parks if waters within the parks were designated as an ONRW.

EPA does not have the authority to designate waters as ONRWs. Nevertheless, there is need to protect certain waters that are vital to the character and function of significant ecosystems. To do so, some States have added additional categories providing more protection. This enables States to give important waters more protection without the severe restrictions accompanying an ONRW designation. The additional protection preserve the special qualities or characteristics of the water consistent with its use.

RECOMMENDATIONS:

The Administration recommends that the definition of a water quality standard be expanded to be consistent with the current application of "State-wide antidegradation policy and antidegradation implementation methods." In addition, the CWA should establish a process that would:

- allow additional tiers of protection to enhance the ability of States to more precisely tailor their antidegradation policy to protect different types of special qualities against unacceptable degradation in important waterbodies that are not ONRWs;

- preserve State flexibility and relies on State expertise in identifying and giving added protection to important waterbodies;

- ensure timely assessment of all waterbodies for added levels of protection, i.e., high quality waters, special protection waters (SPW) and ONRWs;

- provide for the assessment of important waters for which there is a clear federal interest (e.g., national parks, National Marine Sanctuaries and National Estuarine Research Reserves, national wildlife refuges, national wild and scenic rivers, national wilderness areas, etc.) and their consideration for additional protection;

- presumptively apply a SPW level of protection for important waters where there is a clear Federal interest should States fail to make a deliberate determination of whether to provide them with additional protection;

- authorize the Secretaries of Commerce, Interior, and Agriculture to nominate to EPA certain waters for designation as SPW or ONRW, and requires, within 2 years of a nomination, EPA , after notice and opportunity for comments and consultation with affected States or Tribes, to make a determination on the designation of nominated waters. Consistent with State primacy on water

quality standards, this authority should be narrowly exercised when States have not acted timely to protect important federal interests in these waters.

- authorize EPA to designate SPWs and ONRWs and to challenge State or Tribal determinations when they are not fully protective of federal interests in important national waters. EPA should be further authorized to set forth the conditions for their protection after notice and opportunity for comment and consultation with affected States or Tribes, and Federal natural resource agencies. Consistent with State primacy on water quality standards, this authority should be narrowly exercised when States have not acted timely to protect important federal interests in these waters.

POLLUTION PREVENTION IN THE EFFLUENT GUIDELINES PROGRAM

ISSUE:

How should the CWA be amended to improve EPA's ability to promote pollution prevention in effluent guidelines and standards?

BACKGROUND:

Existing effluent guidelines provisions in the CWA give EPA some flexibility in fostering pollution prevention practices; however, some provisions are unclear or restrictive. One could be strengthened to promote source reduction and minimize cross-media transfer of pollutants.

CWA §304(e) authorizes EPA to specify Best Management Practices (BMPs) in effluent guidelines to "control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage ..." for toxic or hazardous pollutants. However, some industries (e.g., pulp and paper) can generate significant amounts of waste due to spills, etc. that consist of conventional or nonconventional pollutants (i.e., not toxic or hazardous) and thus these are not addressed by BMPs in effluent guidelines.

RECOMMENDATION:

- The CWA should be amended to allow EPA to specify BMPs for all pollutants and all sources of pollutants, not just toxic pollutants. This provision would result in a more comprehensive coverage of pollutants, and thereby allow BMPs to be an effective tool to promote pollution prevention.

CHAPTER 3--POLLUTED RUN-OFF AND OTHER FORMS OF NONPOINT SOURCE POLLUTION

NONPOINT SOURCE POLLUTION IN BRIEF

The Administration proposes a fundamental restructuring of the NPS pollution control program under §319 of the CWA. NPS pollution, including polluted runoff, significantly contributes to the Nation's remaining water quality problems. States estimate that nonpoint sources, together with storm water and CSOs, account for over half of remaining impairments of lakes, rivers, and estuaries. Nonpoint sources also affect ground water, riparian areas, and aquatic habitat, such as wetlands.

The Administration proposes a fundamental strengthening of the basic structure of §319, in part by building on a comprehensive watershed protection approach. Existing NPS management programs should be upgraded and strengthened to implement best available management measures for nonpoint sources causing or contributing to water quality impairments or threatening such impairments, within seven and one-half years of enactment of legislation reauthorizing the CWA. This initial implementation period should be followed by a second, five-year period of time to implement further measures where necessary (considering the actual and expected environmental benefits of the original management measures) to achieve water quality standards.

In implementing these strengthened §319 programs, States should rely on a mix of voluntary and regulatory approaches. However, State programs should include enforcement authorities, effective at the time of program approval, to be used as needed to ensure implementation of the management measures. These State authorities should be backed by Federal enforcement authorities that could be exercised if a State should fail. Where States do not develop an approvable program, §319 grants should be withheld from the State, and, EPA should be authorized to establish enforceable minimum NPS controls.

The voluntary element of this approach will require leadership and support at the Federal, State, and local levels of government to address successfully the water quality issues identified by the States under this proposal. The appropriate agencies will need to be actively involved, providing assistance and guidance to those seeking to adopt changes designed to protect and restore water quality. The Administration recognizes that Congress will need to be a partner in the effort to provide the necessary resources to work with the States as they address these water quality issues.

The Administration proposes that funding be increased for State implementation of NPS programs. As an additional source of funding, the Administration proposes

clarifying State revolving loan fund eligibility for NPS projects whose principal purpose is protecting and improving water quality.

Recognizing the crucial role of Federal lands management and Federal activities in NPS control, the Administration proposes clarifying the Act to require that Federal agencies comply with specific State or local requirements in nonpoint source programs to the same extent as non-Federal parties in those watersheds.

STRENGTHENED STATE PROGRAMS

ISSUE:

How should the CWA be amended to strengthen State efforts to protect watersheds from NPS pollution?

BACKGROUND:

NPS pollution including polluted runoff remains the dominant water quality and environmental concern in most areas. For the last decade, States and others have consistently reported that NPS pollution is the main reason that water quality objectives are not met.

States report that, of the waterbodies assessed, two-thirds of our Nation's rivers, streams and estuaries and over half of our Nation's lakes currently meet State water quality standards and designated uses. While these results point to the considerable progress in controlling point sources, our remaining water quality problems are extensive. Of the assessed waters, States reported in 1992 that over 258 thousand miles of rivers and streams, nearly 8 million acres of lakes, and over 9 thousand miles of estuaries do not meet water quality standards or their designated uses. States also report that excess sediment and nutrients are leading causes of wetlands degradation.

States list agriculture as the most widespread category of concern; it adversely affects about two-thirds of all impaired river miles and about one-half of all impaired lake acres. States also identify urban runoff and storm water, resource extraction, hydrologic modifications, and contaminated sediments among the sources most widely contributing to water quality impairments Nationwide. Furthermore, depending on local conditions and economic activity, other nonpoint sources--such as land disposal (including on-site wastewater systems), forest harvesting, and small construction sites--can also be significant contributors to water quality problems.

The leading causes of impairment related to nonpoint sources are siltation, nutrients, and organic enrichment. Moreover, not only the chemical, but also the physical and biological components of aquatic ecosystems, are important to maintaining the integrity of our Nation's waters. For example, development can severely alter the natural vegetation and infiltration characteristics of watersheds, causing higher and more frequent runoff with subsequent downstream erosion, riparian alterations and destruction of habitats, including wetlands. Rivers and streams are also affected significantly by temperature stress, caused primarily by the loss of streamside vegetation that provides shade, and by channelization and hydromodifications (e.g., dams and flow alteration). Wetlands can be adversely impacted by stresses such as pesticides in runoff, hydromodification, urban development practices, and excessive sediment and nutrient loadings.

Current Actions

In 1987, in §319 of the CWA, Congress established a national approach of relying on State programs for managing NPS pollution. Under §319, States were required to develop EPA-approved NPS assessments and NPS management programs to address the identified problems. Approved State programs were eligible to receive EPA grants, and State revolving loan funds, to implement their NPS programs. From FY 1990 through FY 1993, States received a total of $193 million in §319 grants to implement their approved programs.

State efforts to date have led to increased public awareness of NPS pollution and available methods to control it. State NPS activities and projects have demonstrated the effectiveness of a variety of innovative management practices, institutional arrangements, and watershed projects. Efforts by many Federal agencies [e.g., the U.S. Departments of Agriculture (USDA), Interior (DOI), and Transportation, the National Oceanic and Atmospheric Administration (NOAA), and the U.S. Army Corps of Engineers] have buttressed State efforts in this regard and have led to improvements in a significant number of watersheds.

States currently employ a mix of voluntary and enforceable approaches to implement their NPS programs. States are not currently required under §319 to have enforceable policies to implement the programs. EPA does not have any independent authority to establish NPS controls where a State has failed to develop an approvable program; nor does EPA have any other authority to assure that States develop and implement NPS control programs.

As one step to promote increased control of NPS pollution in coastal areas, Congress enacted §6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). EPA and NOAA jointly administer this program. CZARA directs EPA to publish detailed technological baselines (based on "best available, economically achievable" NPS management measures) to guide new State programs to protect coastal waters from nonpoint pollution. CZARA also requires States to have enforceable State policies and mechanisms to implement their coastal NPS programs (no Federal enforcement authority is established). CZARA provides that EPA and NOAA shall withhold specified percentages of States' NPS and coastal zone management grants from States that do not submit approvable coastal nonpoint pollution control programs under CZARA.

Action Needed

Despite State progress under §319 nationally and the promise of CZARA in coastal areas of the country, the problems of NPS-related impairments are so widespread that State programs must advance even further. Existing State programs under §319, while generally providing a good, basic framework, need to be upgraded. While EPA

and States are working to improve §319 implementation, stronger authority is needed if we are to make the progress required.

RECOMMENDATIONS:

Under the Administration's proposal, §319 should be amended to bolster NPS programs by specifying the following:

- Within two years of enactment of CWA reauthorization, and every five years thereafter, States should specifically identify: (1) those waterbodies and their watersheds that are impaired or threatened by nonpoint sources; and, (2) other special waters, such as ONRWs and drinking water supplies. This inventory should encompass major relevant stresses on waterbodies in addition to chemical pollutants. These assessments should be an integral part of the comprehensive State inventory of waters (described in the Monitoring Chapter).

- In impaired, threatened, and special protection areas listed in the State inventory of waters, States should expand their existing NPS management programs to implement best available management measures for categories of nonpoint sources causing or significantly contributing to water quality impairments or threatened impairments. These State programs should be based on EPA-issued national minimum program and management measure guidance, which in turn should consider costs and pollution and risk reductions achieved and should be broad and flexible enough to allow for appropriate local tailoring. Site-specific plans and adaptations to local soil and climatic conditions should be encouraged, provided that: the plans are developed and approved by the relevant Federal or State agency, the plans are designed to manage nonpoint pollution, and the resulting level of control is no less stringent than that established by management measures.

- An initial period of two and one-half years from the date of enactment should be provided to States for developing and submitting their revised NPS management programs, followed by a five-year period for implementation of NPS controls. This should be followed by a five-year period for implementation of additional NPS controls where necessary (considering the actual and expected water quality improvements resulting from the original management measures) to assure that water quality standards are attained and maintained in all waters.

- Additional protection State-wide is necessary as well to make sure that water quality standards (including designated uses) are maintained. Best available management measures should be applied to all new nonpoint sources except for those States with an approved watershed management program.

- Where a State undertakes a strong, broad program to expeditiously address all activities pursuant to the Administration's proposal for watershed management (discussed in Chapter 4), States should be allowed to seek approval from EPA for greater flexibility in developing nonpoint source management measures (under procedures outlined in the NPS control subsection of the "Incentives for Watershed Management issue paper).

- States should be required to include authorities for enforceable State and local implementation mechanisms in their NPS management programs but should be provided flexibility to rely initially as much as possible on successful voluntary approaches. States will need to have enforceable authorities in their programs from the outset as one means of motivating voluntary activity and to address situations where necessary implementation of measures is clearly not taking place. State enforcement authority should include the ability to seek injunctive relief and to impose appropriate civil penalties.

- State and local implementation mechanisms should be specific about the role of Federal facilities as part of the regulated community and enforcement provisions should apply. (See the Recommendations below under "Federal Lands and Activities.")

- To promote State adoption of these strengthened NPS programs, Congress should provide incentives and disincentives, including: increased Federal funding of State NPS programs; authority for EPA to withhold §319 grants from States that do not adopt approvable, upgraded NPS programs or do not implement them; and increased priority for expenditures of other Federal funds for NPS control for those States that adopt approvable, upgraded NPS programs.

- EPA should be authorized to establish enforceable minimum NPS controls where a State has failed to develop an approvable program.

- As a backup to State enforcement of State management programs, EPA should also be authorized to take enforcement action when EPA has provided notice to responsible parties of their requirements to implement program requirements and has also informed the State of this, and the responsible parties have not implemented applicable requirements after receiving EPA's notice. (As a practical matter, this Federal authority would be exercised in those cases where significant environmental harm has occurred or is threatened, and where the State has not taken timely and appropriate enforcement action of its own. EPA should issue guidance, after public input, concerning appropriate penalties and appropriate injunctive relief in federal enforcement actions, and this guidance should be made available to the States. States should be encouraged to adopt this guidance.)

- Citizens should be allowed to petition EPA to take enforcement action where the State has not taken timely and appropriate enforcement action of its own. EPA would take enforcement action, as the Administrator deems appropriate, after EPA has provided notice to responsible parties of their requirements to implement program requirements and has informed the State of the intent to take action, and the responsible parties have not implemented applicable requirements after receiving EPA's notice. (As a practical matter, this Federal authority would be exercised in those cases where significant environmental harm has occurred or is threatened, and where the State has not taken timely and appropriate enforcement action of its own.)

- The Administration intends to work with Congress and States to integrate CWA §319 and Coastal Zone Act Reauthorization Amendments §6217 programs to avoid duplication.

FUNDING AND FINANCING

ISSUE:

What incentives should be provided and what sanctions should be applied to promote improved State implementation of NPS programs?

BACKGROUND:

EPA estimates that the total capital cost to implement best available NPS management measures for all agricultural and forestry nonpoint sources across the country would be about $8.8 billion over the next 20 years.[2] Operation and maintenance costs have not been estimated, nor have needs for such nonpoint sources as hydromodification or storm water runoff from small communities and light industry, which are expected to be significant.

The benefits of NPS pollution control appear to be significant. For example, in 1985, the Conservation Foundation estimated in-stream damages from cropland erosion alone to be $2.5 billion annually and total in- and off-stream damages to be $3.5 billion annually.[3]

For the last few fiscal years, Congress has annually appropriated about $50 million for States and Tribes to implement NPS programs. Other Federal agencies provide additional financial and technical support for activities that help reduce NPS pollution. However, to fully address the considerable national NPS pollution control needs, additional resources will be needed at the Federal, State, and local levels.

The CWA currently contains a one-third of one percent cap on §319 grants to Indian Tribes (resulting in a total of $165,000 in FY 1993). This cap is hindering EPA's ability to assist Tribes in developing and implementing their NPS programs.

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[2]The costs for a more targeted approach, described under "Strengthened State Programs" above, would result in a lower cost than this national figure.

[3]This estimate, in 1985 dollars, does not include water quality damages from animal waste, fertilizer, pesticides, grazing, irrigation or any non-agricultural nonpoint sources.

RECOMMENDATIONS:

- The Administration proposes that §319 grants to States be increased from a base of $50 million per year to $80 million per year in fiscal year 1994 and $100 million per year for each of fiscal years 1995 through 1998.

- The one-third of one percent cap on Tribal grants should be removed.

- The State revolving loan fund eligibility for NPS projects should be restricted to those activities whose principal purpose is protecting and improving water quality to encourage States to use these funds to support their priority NPS projects.

- Pollutant trading techniques between all sources (point and nonpoint) affecting the same waterbody in a similar manner should be explicitly recognized and promoted, and appropriate baselines and boundaries on their application should be defined, to promote sound, cost-effective approaches to meeting water quality standards.

FEDERAL LANDS AND ACTIVITIES

ISSUE:

How should the CWA be amended to promote improved control of nonpoint sources from Federal lands and activities?

BACKGROUND:

Over 29 percent of the land in the United States, 701 million acres, is public land, administered by the U.S. government for various purposes through the Bureau of Land Management, the Forest Service, the Park Service, the Fish and Wildlife Service, the Department of Defense, and other Federal agencies. In addition, many Federal agencies, such as the Federal Energy Regulatory Commission, the Army Corps of Engineers, the Bureau of Reclamation, the Bureau of Land Management, and the Forest Service issue licenses and permits and fund or conduct activities that can, if conducted improperly, result in NPS pollution.

Many Federal agencies implement programs to control NPS pollution that may be associated with their land management or program administration responsibilities. Indeed, some studies have found Federal lands to be better managed, on balance, than similar privately-held lands. However, improved control of NPS pollution is needed for Federal as well as for private lands and activities.

Current law requires Federal agencies providing financial assistance and implementing development projects to be consistent with State NPS management programs or explain why they are not consistent. Under the current system, some conflicts or differences of opinion have arisen among States and Federal agencies as to the extent to which Federal programs are or should be consistent with State programs.

RECOMMENDATIONS:

- Require Federal agencies to implement management measures in the same watersheds and to the same extent as non-Federal entities, except for individual cases where the President determines it to be in the paramount interest of the United States to provide an exception.

- Strengthen §319 consistency provisions to require States to identify the Federal lands and Federal activities that are inconsistent with the State NPS management programs approved by EPA under §319, and require the Federal agencies to comply with State or local requirements under the programs, pursuant to the sovereign immunity waiver in §313 (subject to Presidential exemption). In addition, federal agencies are not relieved from the requirements under the CZMA.

IRRIGATION RETURN FLOWS

ISSUE:

Should the CWA be amended to enhance the management of irrigation return flows?

BACKGROUND:

Current information indicates significant ecological impacts downstream as a result of potentially toxic chemical constituents mobilized from soils by applied irrigation drainwater and transported in irrigation return flows ("IRFs").

IRFs containing high concentrations of salts and trace elements are disposed of by one or a combination of methods including: discharge to holding ponds, local waterbodies, evaporation ponds, or fallow fields; injection into deep wells; or reintroduction into the local irrigation system. EPA reported on this water quality problem in its 1992 Report to Congress on managing NPS pollution.

An estimated 25-35 percent of the irrigated lands in the West have salinity problems, and the problems are increasing. The high rate of evapotranspiration in the western States has led to increased levels of toxic constituents in evaporation ponds where most of the documented drainage-related impacts to wildlife have been observed. This problem does not appear to be limited to the DOI's 26 reconnaissance study sites.

Contaminated drainwater may permanently perturb an ecosystem's biological and chemical balance. Aquatic plants and animals can accumulate tissue concentration of some drainage contaminants 100 to 10,000 times greater than ambient water levels. In the San Joaquin Valley, California, field studies in 1987 and 1988 documented adverse biological effects in birds at 7 of 12 ponds studied, representing approximately 60 percent of the total acreage of ponds in the valley.

IRFs enriched with boron and selenium and containing extraordinary concentrations of salts are often commingled with water supplies for public and private wildlife areas. The drainage water continues to provide instream flows for fisheries and other beneficial uses. However, untreated drainage effluent has been identified in studies by the Fish and Wildlife Service and others as a serious threat to the health of fish and wildlife (impacts associated with IRFs have been shown to cause reduced survival, reduced growth, and decreased reproductive success in numerous species) and potentially humans. The U.S. Fish and Wildlife Service estimates that up to 10 percent of Federal wildlife refuges nationwide may be affected by this water quality problem. Health advisories have been issued recommending limited or no consumption of certain fish and wildlife with documented high concentrations of IRF

constituents. Several areas in the West have issued fisheries consumption advisories, and waterfowl consumption advisories have been implemented in Utah and California.

Agricultural drainwater is exempt from NPDES permitting requirements under §402 of the CWA. The National Research Council has recommended that irrigation return flows not be exempt from Federal or State water quality standards and enforcement.

RECOMMENDATION:

- EPA , with the concurrence of the Departments of Agriculture and the Interior, and after consultation with States and other Federal agencies, should submit a report to Congress within two years of enactment which:

  - o evaluates the nature and extent of water quality problems presented by irrigation return flows;
  - o identifies the most promising and cost-effective technical and programmatic solutions to those problems; and,
  - o recommends appropriate actions, including programmatic improvements and necessary legislative changes.

  The report should reflect all relevant existing studies and monitoring information and take existing programs and initiatives into account.

CHAPTER 4--WATERSHEDS

WATERSHED MANAGEMENT IN BRIEF

The Administration proposes a new provision in the CWA to establish State-wide programs for comprehensive watershed management. The proposed watershed management approach would focus attention within hydrologically-defined watershed areas and engage stakeholders from all levels of government as well as the private sector. Working together the stakeholders would identify priorities and carry out actions tailored to address the specific set of problems found within the watersheds.

The watershed approach makes good sense environmentally and programmatically. Thinking more comprehensively, watershed management teams that combine the expertise and authorities of many disciplines can realize environmental improvements that go beyond traditional command-and-control, chemical water quality programs. For example, through the Anacostia Watershed Restoration Agreement, representatives from Federal, State, and local governments, the business community, and volunteers in the Washington, D.C. area have been working side-by-side to improve one of the Nation's most blighted waterways. Fish migration barriers are being removed, riparian areas revegetated, and wetlands restored and created, all in addition to traditional control of discharges from point sources. There are many other examples of excellent collaborative and comprehensive projects that address the particular problems found within watersheds around the country. The Administration's provision would promote and support these efforts and more.

Under the new provision, States, Territories, and eligible Tribes[4] could choose to implement comprehensive watershed programs, which would be approved by EPA after conference with other Federal agencies. The States would determine the boundaries for all watersheds in the State and set a schedule for addressing those watersheds. Where the level of work and the need for coordination dictates, the States could establish watershed management entities with appropriate representation of stakeholder interests regardless of race, ethnicity, or income. The States would oversee the work of such entities and approve the watershed management plans developed by them. The individual watershed management entities would serve as focal points for comprehensive analysis, problem solving, and implementation efforts to address water quality concerns, as well as aquatic living resource and human health issues.

The Administration also proposes three other changes to the Act that (1) would provide guidelines for States wishing to adopt market-based approaches to point and

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[4]Throughout this Chapter, "States" means all States, Territories, and eligible Tribes, where applicable.

NPS pollution controls within watersheds; (2) promote the development of wetlands management plans that would lead to increased flexibility and predictability of the wetlands permit process on a watershed basis; and, (3) create comprehensive State inventories of waters that are threatened, impaired, or in need of special protection (see the discussion of this proposal in the Chapter on Monitoring).

STATE WATERSHED PROGRAMS

ISSUE:

Should the CWA be amended to provide for a comprehensive, integrated watershed management approach? If so, what should be the elements of a State watershed program?

BACKGROUND:

Over the past 20 years, substantial reductions have been achieved in the discharge of pollutants into the Nation's lakes, rivers, wetlands, estuaries, and coastal waters. These successes have been achieved primarily through the control of point sources of pollution. While point source discharges continue to present an environmental threat in some areas, it is now well understood that potential causes of impairment of a waterbody are as varied as human activity itself. For example, besides discharges from industrial or municipal sources, the health of an aquatic ecosystem may be threatened by: urban, agricultural, or other forms of polluted runoff; land disturbance activities and hydromodification; altered flows and ground water tables; over harvesting of fish and other organisms; introduction of exotic species; and deposition of pollutants originally emitted into the atmosphere. Evidence of impacts from such sources can be seen in the decline of the salmon populations in the Pacific Northwest, the declining oyster stock in the Chesapeake Bay, the declining health of the Everglades and coral reef systems in Southern Florida, and in numerous other small and large watersheds across the country.

Many of these activities are not addressed effectively by programs under the CWA and a variety of other Federal laws that provide mechanisms to protect, restore, and enhance our water resources. The several Federal laws that address or partially address these problems have tended to focus on particular sources, pollutants, or water resource uses and generally do not take an integrated environmental management approach to all water resource issues within hydrologic boundaries. As a result, significant gaps exist in our efforts to protect ecosystems from the cumulative impacts of a multitude of activities.

Existing water pollution prevention and control programs do, however, provide an excellent foundation on which to build a comprehensive, geographically-based approach--*a watershed management approach*. The watershed management approach provides for: (1) recognizing that all resources within natural (hydrologically-defined) watershed boundaries are part of interconnected systems and are dependent upon the health of the ecosystem as a whole; (2) identifying priorities and tailoring solutions to focus limited available resources to address the specific set of problems found within those systems; (3) building partnerships and integrating Federal, State, Tribal, regional, Territorial, local, and private programs within the watershed; and, (4) building

local commitment to implement chosen solutions, thereby achieving greater efficiencies and effectiveness through management on a watershed basis.

State-based programs can be effective and efficient mechanisms for promoting comprehensive watershed management activities. Many water programs and other natural resource management, protection, restoration, and remediation programs are implemented through the States. A comprehensive State program would provide for an inventory of all watersheds and, thereby, assure a more consistent, risk-based approach to selecting watersheds for priority treatment, for example, highly-threatened watersheds, pristine watersheds, and important urban watersheds. It would also assure more extensive use and integration of the approach as a way of managing water-dependent ecosystems. Finally, a State-based watershed program would respect the key role played by States in the water pollution control program and allows for a program authorizing State approval of individual watershed management plans. Earlier area-wide planning efforts were of limited success because they did not adequately recognize this key State role.

For these reasons, States are the logical units to develop State-wide watershed programs and to oversee development of watershed management plans (hereafter referred to as WMPs) within their jurisdictions.

RECOMMENDATIONS:

The CWA should provide for the development of State watershed programs subject to EPA approval and oversight, with significant involvement from other appropriate Federal agencies. The statute should be clear that, except as specifically provided for under the proposed incentives, nothing in the watershed provision would alter any State or local government responsibilities under the CWA or any other Federal law.

To be eligible for approval, the Act should require that State watershed programs include the following elements:

- An identification of the State agency responsible for overseeing and approving watershed management plans, and for designating watershed management entities and lead responsibilities for such entities, which might include any other State agencies or sub-State agencies.

- A determination of watershed boundaries throughout the State. States should work with adjacent States to establish boundaries for those watersheds whose hydrologic boundaries cross State boundaries. Watershed scale should be determined by the State; however, the U.S. Geological Survey (USGS) hydrologic cataloging system should be used as the basis for delineating watersheds, and appropriate ground water mapping features should be taken into account.

- Selection of priority watersheds for developing and implementing watershed management plans. States should identify the watersheds for which they would develop and implement plans. In addition, States would submit to EPA the factors by which they selected such priority watersheds. These factors should include: (1) the presence within the watershed of threatened or impaired waters, especially those affected by NPS pollution; (2) the need to protect highly productive, fragile, declining, or unique habitats, such as wetlands (based on the comprehensive State inventory of waters); (3) the degree of risk to the ecosystem and human health; and, (4) the need to restore and/ or maintain waters of special importance to communities, for example valuable urban waterways. Other programmatic factors, such as the cost of achieving environmental objectives, workload, and the availability of technical or financial resources, could also be included.

- A schedule, including appropriate milestones, for progressively achieving environmental objectives in all watersheds within the State. States should devise schedules that provide for a relatively constant level of effort with the ultimate goal that environmental objectives, including water quality standards, be met not later than 15 years after enactment. The schedule should lay out a logical sequence that provides for early development of plans and implementation of actions to achieve environmental objectives highest priority watersheds first; and provide that plans will be approved and adopted for all priority watersheds within 10 years of enactment. For example, a State might set a schedule that would provide for plans to be completed in one-third of its highest priority watersheds in the first three years; those plans would be implemented while planning was begun in the second tier of watersheds, and so on. Detailed plans developed by watershed management entities should not be required in all watersheds; however, the State should be responsible for attaining and maintaining environmental objectives as expeditiously as possible but no later than 15 years after enactment in all watersheds.

- Designation of watershed management entities and the lead organization of each entity, as needed. Some watersheds may need minimal work to maintain or meet the goals of the CWA. For these watersheds it may not be necessary to establish management teams; rather, actions on the part of a State agency to ensure restoration or protection or a reassessment at a later date to verify ecosystem health may suffice. Other watersheds may need intensive management over time involving many levels of government and other organizations. In those cases, States should be encouraged to designate new or existing entities, such as entities administering National Estuary Programs under CWA §320, to facilitate development of appropriate interstate and international efforts. Any designated watershed management teams should include an array of interested and affected parties.

- An identification of State environmental objectives to be adopted and achieved, as appropriate, by watershed management entities that, at a minimum, consist of: (a) water quality standards, including, as expeditiously as possible, criteria for human health, biological, habitat, nutrient and other ecological endpoints, adopted by the State for each watershed; and (b) other environmental goals such as acres of various categories of wetlands and percentage of stream miles with healthy riparian zones. In identifying State objectives for watershed management, the States should be encouraged to build on existing Comprehensive State Ground Water Protection Programs.

- Necessary components for watershed management planning, implementation, monitoring, and reporting requirements that must be met in order to qualify for incentives.

- Working cooperatively with other States as appropriate for interstate watersheds, processes for State approval of watershed management plans, including public review of plans and for ensuring compliance with other State and Federal statutes.

- A process for State oversight and evaluation of watershed management planning and implementation efforts.

- A process for public involvement in watershed management to the maximum extent practicable. States should provide public notice and an opportunity to comment on the State watershed program prior to submittal of the program to EPA for approval. States should also encourage formation and participation of public advisory groups during the watershed program development.

- A demonstration of the capability to implement the State watershed program, including enforceable policies and mechanisms and requirements no less stringent than those established for sources under other sections of the CWA and other applicable Federal laws and in effect as of the date of program submission. This should include regulation of private and Federal facilities and any water allocation or use laws or programs that the State must or elects to apply.

- For each watershed, a description of the process for involving:

    - those Federal agencies with a local interest in the watershed;
    - those Federal agencies with natural resource trust responsibilities or facilities or activities within the watershed (States must provide an opportunity for such agencies to participate);
    - those States whose land area encompasses a portion of the watershed; and

- those Indian Tribes whose land area encompasses a portion of the watershed.

States should work with representatives from a broad range of stakeholders, including all levels of government, during all steps of State program development. There should be no deadline for submitting State programs; however, to be eligible for the nonpoint source incentive as described in the incentives section, certain showings must be made within 30 months of enactment, and such showings must subsequently be approved by EPA.

MINIMUM ELEMENTS FOR A WATERSHED MANAGEMENT PLAN

ISSUE:

How can the CWA empower State and local efforts to comprehensively manage watersheds? What should be required as minimum elements of any watershed management plan?

BACKGROUND:

The State watershed program provides a logical, risk-based framework for addressing all watersheds within each State. Successful management of specific watersheds, however, is critically dependent upon locally-based processes. In many cases, it is the local citizenry who will implement WMPs and who have the keenest sense of many of the problems and opportunities presented within the watershed.

Experience with such geographically-based programs as the Clean Lakes Program, National Estuary Program, Chesapeake Bay, Great Lakes, and Gulf of Mexico Programs indicates that people are most likely to care about, and care for, the particular body of water near which they live and on which they depend for drinking water, recreation, sustenance, or their livelihood. State-designated watershed management entities will: build on this local commitment; coordinate private sector, regulatory, and voluntary programs; and comprehensively address cumulative impacts by developing and implementing solutions appropriate to the particular watershed.

RECOMMENDATIONS:

Amendments to the CWA should direct those watershed management entities or State agencies that have been designated to carry out watershed-level management under an approved State watershed program to undertake the following activities:

1. Provide for the participation of all affected and interested parties including all levels of government, nongovernmental organizations, the private sector, and the public.

2. Establish a protocol for making decisions and resolving conflicts among members of the watershed management entity.

3. Establish local environmental objectives for comprehensive watershed management that would further the goals of the CWA and be consistent with all applicable State, Tribal, and Federal statutes and regulations, including water quality standards.

4. Identify environmental indicators to be used to monitor and report on attainment of the environmental objectives.

5. Characterize the watershed ecosystem, including an analysis of the causes and sources of point and nonpoint pollution as well as an inventory, as necessary and appropriate, of wetland and ground-water resources and other valuable aquatic habitat and a description of the major causes of loss and degradation of these resources in the watershed.

6. Identify specific implementation actions, and, to the extent practicable, their costs, including voluntary, mandatory, and educational efforts, that will attain and maintain water quality standards and meet other environmental objectives.

7. Develop a Watershed Management Plan (WMP) that lays out a schedule and specifies who will oversee implementation as well as the persons responsible for implementing specific actions under the plan. The WMP should also identify existing and potential sources of funding for implementation.

8. Implement the plan, evaluate progress toward meeting environmental objectives, and provide reports to the State consistent with the requirements specified by the State. Watershed management entities should develop cost-effective physical, chemical, and biological monitoring programs, coordinating with and/or incorporating volunteer monitoring as appropriate. The statute should require that all watershed-level management entities receiving Federal funding carry out some level of monitoring and assessment of risks to public health and living resources. The intensity and frequency of monitoring will vary with watershed goals and degree of risk and should not be specified in the Act; rather, the statute should require that intensity and frequency of monitoring be covered by EPA guidance.

9. Identify the enforceable policies, mechanisms and requirements, including those established for sources under other sections of the CWA, and other applicable Federal and State law that will be used to enforce the appropriate elements of requirements of the watershed plan. These policies, mechanisms, and requirements may be existing or newly-developed, but all must be in effect on the date of program submission. The policies, mechanisms, and requirements should build upon, integrate, and be no less stringent than other sections of the CWA or other applicable federal and State laws. Demonstrate the capacity to take administrative, civil, and judicial enforcement actions as necessary, including treating Federal facilities as other facilities would be treated with respect to requirements in, or developed pursuant to, WMPs.

10. Revise plans and actions as needed to achieve the necessary progress towards meeting environmental objectives.

11. Notify all parties of their roles and responsibilities for implementing the plan.

THE FEDERAL ROLE IN WATERSHED MANAGEMENT

ISSUE:

How should EPA and other Federal agencies with interests in watershed management provide support and oversee State and local efforts?

BACKGROUND:

Under this watershed approach, both the State watershed program and locally-based watershed management entities would draw upon the resources, skills, and authorities of their many participants to carry out their respective responsibilities within the watershed planning and management context.

For example, within a hypothetical watershed management entity, representatives from the State might bring to the table their expertise and authorities on managing point sources and nonpoint sources, and representatives from the U.S. Fish and Wildlife Service would provide expertise and authority on endangered species and other living resources. Likewise, representatives from the Corps of Engineers would bring expertise and authority on flood control and wetlands, and local government officials would bring land use management expertise and authorities. Also, landowners and public interest groups and interested citizens would bring their own professional expertise and personal convictions. The blend of stakeholders will vary from watershed to watershed, but, if planned properly, the team will identify problems, set priorities, and conceive and implement solutions with the necessary authorities to meet environmental objectives.

The challenge for Federal agencies in watershed management is two-fold: first, to participate; and second, to provide incentives for watershed management; streamline operations wherever possible, and provide adequate oversight of Federal expenditures.

RECOMMENDATIONS:

<u>Guidance</u>

- EPA should confer with appropriate agencies and issue guidance to the States for the design of their watershed programs. The guidance should describe in detail how States might best meet the minimum elements set forth in the Act.

- In addition, Federal agencies should provide States and watershed entities with information on non-water quality considerations and national interests in them which may be appropriate for consideration in formulating environmental objectives, such as energy development and conservation, transportation, etc.

Approval

- The statute should require States to submit their watershed program to EPA and provide that within 180 days of receipt, EPA--after conferring with other Federal agencies to allow consideration of other national interests--should approve or disapprove the program. Any disapproval should be in writing and should specify any modifications that are necessary for approval. Approval would need to occur before States would be eligible for the benefits specified in the following discussion regarding incentives for watershed management.

- In any case where EPA disapproved a State program, the State should have six months to amend the program.

Review

- Success of the watershed program should be measured in terms of: (1) environmental conditions; (2) programmatic changes; and (3) changes in risks to public health and living resources.

- Every year following State watershed program approval, each State with a watershed program should submit a summary status report on accomplishment of action items, identification of environmental indicators (including indicators of physical, chemical, and biological health), and progress toward achieving environmental objectives specified in the State watershed program. To the extent practicable, Federal agencies should permit the use of State watershed program status reports to satisfy reporting requirements under other sections of the CWA and other Federal programs.

- Every five years following State watershed program approval, the States should submit a revised State watershed program. EPA, after conferring with appropriate Federal agencies, could disapprove a revised State watershed program if:

    - o the program did not meet the purposes of the watershed management provisions;
    - o the State was not meeting milestones as specified in their watershed program schedule; or,
    - o the State was not making reasonable progress toward meeting its stated environmental objectives.

- As with initial program approval, any disapproval of a revised State watershed program should be in writing and should specify any modifications that are necessary for approval, and the State should have an opportunity to amend the program as specified by EPA. EPA and other Federal agencies should advise

States and local units on how to improve performance, as appropriate. In States where plans were not being developed, or where WMPs are not being implemented, EPA could withdraw financial support and rescind incentives.

Revocation of Incentives

- If at any time EPA, after conferring with other Federal agencies, finds that--

  - o a State watershed program did not meet the requirements of the watershed management provision;
  - o an approved State watershed program schedule is not being met; or
  - o the practices and measures proposed in watershed management plans under the program are not adequate to attain the stated environmental objectives,

  then EPA should notify the State, in writing, of any revisions or modifications necessary to meet requirements of the watershed management provisions and hence to continue to receive incentives. As with program approval and review, the State should have an opportunity to amend the program to meet the requirements specified. EPA should determine whether requirements have been met as expeditiously as possible. If EPA determined that the State had not met the requirements or if the State failed to submit a revised program, then EPA could revoke such incentives as deemed appropriate.

Intergovernmental Coordination

- The statute should provide for the establishment of a committee--including representatives from Federal, State, and local governments--to coordinate support of watershed activities, including the development and provision of technical tools and training to improve watershed management capabilities.

- Although not requiring a statutory amendment, Federal agencies should: participate in watershed-level management, use their authorities and coordinate their priorities to promote watershed management, and, implement their programs to the maximum extent practicable in accordance with State-approved WMPs. In addition, Federal agencies should provide States and watershed entities information on non-water quality considerations and national interests, such as energy development and conservation, transportation, etc., that may be appropriate for consideration in formulating environmental objectives. In those areas of the country that did not fall under the jurisdiction of States with approved watershed programs, Federal agencies should use a watershed approach to the maximum extent practicable in implementing Federal programs.

Enforcement

- Because the watershed program would integrate existing authorities, enforcement responsibilities under the CWA would be applicable within the watershed program through the individual authorities and responsibilities provided under other CWA sections. For example, NPS pollution controls would be Federally enforceable in the watershed context through §319, and point source control enforcement responsibilities under §§402 and 404 would apply within the watershed context.

INCENTIVES FOR WATERSHED MANAGEMENT

ISSUE:

What incentives are necessary to promote State adoption of watershed programs?

BACKGROUND:

Significant enthusiasm already exists for the watershed approach. This may be attributed to the fundamental logic of organizing water resource programs within naturally-defined areas and a belief that the approach will help programs to operate more efficiently and effectively. In North Carolina, for example, both point and NPS water quality issues are being addressed simultaneously under one plan for each of seventeen basins. Other States and localities are incorporating such issues as water quality, wetlands, ground water, drinking water, living resources, and flood control into comprehensive basin management plans. It is important to sustain the current enthusiasm and commitment to the watershed approach at both the State and local levels.

It must also be recognized that a great deal of effort may be required to achieve programmatic changes and to implement a truly comprehensive approach with broad environmental objectives that may go beyond the scope of traditional water quality standards. For example, State departments that deal with health, agriculture, fisheries, and the environment may need to coordinate and integrate assistance to and participate in watershed management efforts. In addition, States need to ensure that plans will actually result in actions.

Currently, there are several separate grant authorizations that support water programs under the CWA. Administering these separate grants with their distinct requirements imposes a large burden on the States. To comply with the requirements of the CWA, each grant must be individually applied for, matched, managed, tracked, and closed out. These requirements impose duplicative administrative procedures and thereby divert scarce resources that States could allocate to water program implementation activities. In addition, States must meet different matching fund requirements for each of these grants.

For these reasons, financial and regulatory incentives need to be sufficient to ensure widespread application in accordance with the purposes of the watershed management provisions of the Act.

RECOMMENDATIONS:

Recommendations for incentives for State participation fall within two major categories: (1) incentives that require amendments to the CWA, and (2) those that can be provided through administrative actions. Some incentives would be authorized upon EPA approval of a State's management program; others would be authorized after additional conditions or approvals were met.

Incentives Requiring Amendments to the CWA

Funding

- The Administration proposes that the Act be amended to establish a "multi-purpose" State water grant. States with approved watershed management programs would be allowed to apply for a multi-purpose grant that would provide single application, work plan and review, matching, oversight, and end-of-year close-out requirements. Consolidating these requirements would allow States to focus activities funded under different statutory authorities [sections 104(b)(3), 104(g), 106, 314(b), 319, and 604(b)] in watersheds on a priority basis consistent with approved State watershed management programs. In addition, under the multi-purpose grant provision, States should match Federal funds at 40 percent in Fiscal Year 1995 and 50 percent in Fiscal Year 1996 and beyond.

- The Act should expand SRF priority systems and project priority lists to include all SRF-eligible activities, and should encourage States to include among the factors considered in the SRF priority system projects contained within approved watershed management plans. (See the discussion "Project Targeting and Priority Setting" in the Chapter on Funding.)

- Section 604(b) should be amended to allow States with approved watershed programs to reserve, specifically for watershed management planning, an additional two percent over the currently authorized "planning" reservation of one percent of the funds allotted under §604.

- Also, the statute should reserve a significant percentage of any future increases to funds annually appropriated under §319(h) to support the implementation of NPS pollution control measures under State-approved watershed management plans.

Nonpoint Source Controls

- The Administration proposes revisions to §319 that would provide for the application of best available management measures to both existing and new sources in impaired and threatened watersheds and to new sources in all other watersheds. States should establish best available management practices as set forth in national guidance by EPA or equivalent site-specific plans under the Administration's proposed NPS program unless they can identify alternative nonpoint source management practices or methodologies for developing such practices that will attain the environmental objectives established under the watershed program, including water quality standards, as expeditiously as practicable, but not later than 15 years after enactment. To be eligible for this incentive, States should show that they will employ an iterative approach so that alternative nonpoint source controls are implemented within ten years of enactment, followed by monitoring and by additional controls if necessary.

  Alternative practices or methodologies should be submitted to EPA for approval not later than two and one half years after enactment. If EPA approves such alternative practices or methodologies, then the State's nonpoint source management program may rely on such practices of methodologies. All alternative watershed nonpoint source control practices and milestones for implementation would need to be identified in the appropriate watershed management plans adopted under the State's watershed program.

- In accordance with the Administration's proposal for NPS controls, NPS controls would need to be backed by adequate policies, mechanisms, or requirements.

- If for any reason the NPS incentive were revoked by EPA, then the State would need to submit a revised NPS program in accordance with §319, as amended, no later than one year after the final notice of revocation.

Point Source Control Permits

- For States with approved watershed programs, the Act should allow, at the State's discretion, a one-time extension of NPDES permit terms up to five years beyond the current NPDES permit expiration date to give States flexibility to align the timing of permits for point sources within watersheds. However, facilities would still be required to timely submit a permit application, and States would retain the authority to immediately reissue a permit to any facility if the permit application indicates an impairment of water quality. The permitting authority could revoke the extension and issue a new permit requiring immediate compliance if the permitting authority--at any time during

the extended term of the permit--determined that additional permit limits were necessary to control potential negative impacts of the facility.

- In addition, in watersheds with State-approved watershed management plans, the statute should allow EPA, or any State with §402 permit authority, to issue a 10-year permit to any point source located in the watershed, if water quality standards were being met in the waters to which the point source discharged at the time of permit issuance and if, for the period encompassed by the permit, the plan provided for the maintenance of water quality standards.

- Finally, the Act should allow that an amount equal to the fees collected pursuant to proposed subsection 402(s) may be discounted from the required amount of State matching funds for Federal funds made available to the State pursuant to section 106 if the State had an approved watershed program.

Criteria/Standards

- In the event that the CWA continues to require a triennial review process, the statute should extend the period for a comprehensive review and revision of all use designations, criteria, and antidegradation policies to five years for States with approved watershed programs. This longer period of review would allow for additional flexibility in review time to provide greater consistency with watershed planning efforts.

Federal Consistency

- To the extent that a State-approved watershed management plan imposed new requirements that were not otherwise provided under sections 301, 302, 303, 306, and 307, or any State law, §401 should provide the State authority to certify whether Federal permits or licenses comply with such requirements.

Drinking Water Requirements

- The Administration proposed changes to the Safe Drinking Water Act (SDWA) that would allow for tailored prevention, monitoring, and treatment alternatives where watershed protection measures had been taken to protect drinking water sources. If such proposed changes were incorporated into the amended SDWA, alternative regulatory approaches would be allowed within watersheds provided the State-approved watershed management plans met all source water protection conditions of the amended SDWA.

Incentives Provided Through Administrative Actions

Multi-year Work Plans

- Alignment and streamlining of grant cycles and procedures, and provision of multi-year planning would reduce paperwork and otherwise simplify watershed management activities. Because no change to the CWA is necessary to accomplish this, EPA will pursue the establishment of this incentive in administrative contexts.

Streamlining Operations

- To the maximum extent feasible, approved State watershed programs would fulfill inventory, ranking, planning, and reporting requirements under §208, §303(d), §303(e), §305(b), §304(l), §314, §319, §320 and other programs, such as Wetland Conservation Plans, USDA River Basin Plans, and State Coastal Nonpoint Pollution Programs under the Coastal Zone Management Act Reauthorization Amendments of 1990, provided that the State watershed programs met the particular requirements of the other programs listed above.

Technical and Financial Support for Wetlands Protection

- State-designated watershed management entities requesting support for wetlands identification and mapping, functional evaluation, restoration planning, and/or private or public initiatives would be considered high priority for receiving Federal technical and financial support.

WATERSHED MARKET-BASED APPROACH

ISSUE:

Consistent with Vice President Gore's National Performance Review, how should pollutant trading be encouraged and implemented in the reauthorized CWA to promote market incentives that reduce pollution?

BACKGROUND:

Trading programs are proving to be a successful and cost-effective approach for reducing air pollutant emissions under the Clean Air Act. Similarly, trading of pollutant reduction credits among different sources and other market oriented mechanisms like bubbles or averaging will offer an important means to lower the cost of meeting CWA goals. In fact, several case studies in North Carolina, Colorado, and Wisconsin show that the trading of pollution credits holds considerable promise for reducing water pollutant loadings, particularly nutrients. As many as 943 water-quality limited water bodies could benefit from nutrient trading.[5]

Under trading, sources with low control costs would make arrangements with sources facing high control costs. The low-cost sources would undertake additional pollutant reductions in exchange for financial compensation from the high-cost sources. Sources with higher abatement costs would undertake less control efforts, while acquiring additional reductions from other, lower-cost sources.

Trading agreements involving the exchange of pollution reduction responsibilities may take many forms. Dischargers might for example pay for upgrading on site treatment; finance nonpoint source controls directly; contribute to a fund to implement nonpoint source controls individually or on a basin-wide scale; contract directly with third parties or sources to install and/or maintain nonpoint source controls; negotiate directly with other sources (point or nonpoint) to achieve needed water quality-based pollution reductions; agree to alter behavior; or purchase land or facilities for purposes of instituting or enhancing treatment.

Since the success of trading programs depends on the voluntary participation of independent sources, the responsibilities of trading partners need to be carefully defined. Trades should shift the responsibility for the agreed to controls entirely from the buyer to the seller, who would then be subject to enforceable requirements stemming from the trade itself.

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[5] See Podar, M., and M. Luttner, "Economic Incentives in the Clean Water Act: Some Preliminary Results", presented at the Air and Waste Management Association, June 1993.

Successful trading requires that the costs of transacting trades be kept low. Criteria for prior approval can facilitate trades by reducing the costs associated with delays and uncertainty over what trades might be considered valid by enforcement authorities.

Another important element of transactions costs is the additional monitoring of loadings reductions that may be associated with a trade. Such monitoring may be quite costly for many nonpoint sources. Reasonably reliable and unbiased estimates of loadings derived from models of runoff may be adequate in lieu of on-site monitoring but this issue should be the subject of further study.

For those pollutants for which total maximum daily loads (TMDLs) are established under CWA Section 303(d), the TMDL process can be used as a basis for trades.[6] Once a TMDL has been established, sources of pollution may exchange, trade, buy or sell reductions within the geographic area covered by the TMDL. Point source effluent limits can be designed to meet water quality goals and at the same time reflect trading agreements among the pollution sources.

Trading may occur among point sources, between point sources and non-point sources, or among nonpoint sources. It might even include inter-media trading, if, for example, emissions through air deposition contribute to water pollution. Nonpoint source trading is especially important because the control costs may be substantially less than those for point sources, although issues related to the measurement and timing of loadings need to be addressed.

A final possibility for trading is among indirect industrial dischargers who discharge to a given publicly owned treatment works. Since such discharges all enter the environment at a single discharge point, the possibility of "hotspots" of pollution is eliminated.

RECOMMENDATIONS:

- EPA should conduct a study to assess trading opportunities for conventional pollutants, between pollutants with similar environmental effects, for toxic pollutants, between different media, and among a variety of point and non-point sources. The study should also evaluate how best to implement such trades.

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[6] TMDLs are the maximum loadings that a waterbody can assimilate without violating water quality standards.

- The Act should authorize EPA to publish a guidance document, using the results of its study and after conferring with Federal and State agencies, about trading of pollutants. The guidance should:

  - o establish criteria to allow for prior approval of trades by State permitting authorities and by agencies that administer control programs,

  - o specify that trades shall not violate water quality standards,

  - o specify that where water quality standards are not met, trades based on TMDLs may still take place,

  - o identify settings in which reasonably accurate and unbiased estimates of pollutant loadings based on models may be suitable for use in trades that the high cost of on-site monitoring would otherwise prohibit,

  - o clarify that the anti-backsliding clause of the CWA (Section 402(o)) does not prohibit trading, and

  - o authorize trading among indirect industrial dischargers to the same publicly owned treatment works.

- EPA should report to Congress about the likely environmental and economic costs and benefits of trades that would allow sources to increase on-site pollutant loadings above more stringent technology-based effluent limits.

- EPA should be authorized and directed to undertake demonstration projects to implement inter-media pollutant trading in order to evaluate the environmental and economic benefits of such pollution trading. Some of these projects will demonstrate the concept of "risk bubble," for which a facility emitting pollutants to more than one medium is permitted to meet overall health and environmental risk reduction targets by obtaining pollution reductions anywhere within the facility, irrespective of receiving media. Other projects will demonstrate the concept of "inter-media loadings trading," a program allowing TMDLs in a watershed to be met (or maintained) by sources trading loadings reductions irrespective of the original receiving medium. For instance, an electric utility with nitrogen dioxide emissions that contribute to fertilization of the Chesapeake Bay could meet its nitrogen dioxide reduction targets by paying farmers to reduce fertilizer use. No projects should be undertaken without the prior consultation and consent of the appropriate State, Territorial, or Tribal authorities.

- The Administrator should regularly confer with the States on the activities under this section, and, within four years of enactment, submit a report on the

environmental and economic benefits and costs of the projects above to Congress and participating states. The report should identify existing technical, regulatory, and financial impediments to adopting such approaches examined in the projects and shall make recommendations, as appropriate, to facilitate their adoption.

RESTORATION OF URBAN WATERS

ISSUE:

How can the Clean Water Act empower local efforts to restore urban waterways, especially those in communities that have been disproportionately impacted by environmental degradation?

BACKGROUND:

While rivers, streams, and lakes in the nation's metropolitan areas supply drinking water to 200 million U.S. citizens and together with urban wetlands, provide recreational opportunities for millions more, these waters are among the nation's most degraded. Channelization, runoff from nearby agriculture, runoff from city streets and lawn care, spills from trash disposal, removal of important nearby vegetation, and combined sewer overflows pose unique threats to rivers and streams running through the nation's cities.

While a number of provisions within the Clean Water Act already address certain aspects of urban river pollution including urban storm water, nonpoint sources, combined sewer overflows, and water quality standards, the severity of the degradation calls for specific attention to directly address problems unique to many urban communities. The benefits of an urban restoration program extend beyond safe drinking water and include opportunities for recreation, subsistence fishing, employment and economic development.

Experience demonstrates that urban river restoration efforts are most successful if carried out by those living on or near the streams in conjunction with a state or local conservation corps and State and local government entities. Technical assistance can be provided by the many successful state urban restoration programs or by federal agencies, such as the National Park Service's Rivers and Trails Technical Assistance Program, which has great expertise and experience through its "Metropolitan Rivers" program.

RECOMMENDATIONS:

Amendments to the Clean Water Act should emphasize restoration of urban waters by:

- encouraging States to give urban watersheds a high level of priority in their State-wide ranking of watershed initiatives;

- requiring States to monitor and report on the quality of urban waters when the States submit periodic reports to EPA on water quality;

- authorizing the use of the State Revolving Loan Fund to support riparian restoration in urban waters; and

- encouraging neighborhood or regional nonprofit watershed citizen groups and councils to develop consensus watershed restoration strategies, conduct volunteer monitoring programs, and build long-term commitments within communities to protect water resources.

CHAPTER 5--ENFORCEMENT

CIVIL JUDICIAL ENFORCEMENT AUTHORITIES

ISSUE:

Should the CWA's civil judicial enforcement provisions be modified in several ways to improve the United States' enforcement capabilities?

BACKGROUND:

Establishing Economic Benefit as a Minimum Penalty Requirement

The CWA provides that any person who violates the Act shall be subject to a civil penalty, which may be imposed judicially under CWA §309(d) or administratively under §309(g). Section 309(d) and (g) establish statutory maximum penalty amounts and provide factors to be considered in assessing penalties, one of which is the economic benefit obtained by the violator through the violation. These sections do not mandate the imposition of any minimum penalty, however, and thus allow a court or administrative law judge to award penalties that do not recoup a violator's economic benefit, which in fact, has happened in recent cases. Such decisions undermine the deterrent value of penalties under the Act, making it economically advantageous to violate the CWA. The Act would also be strengthened if, in those instances in which the economic benefit of noncompliance exceeded $25,000 per violation per day, the court were still required to order a penalty sufficient to recoup economic benefit so as to ensure that no violator profits from noncompliance.

Examples of Appropriate Injunctive Relief

CWA §§309(b) and 505 authorize the United States and citizens, respectively, to seek injunctions to redress violations of the Act. These sections provide no specificity as to the type or nature of the measures that a court may order in an injunction. The United States takes the view, particularly in the context of §309(b), that a court may order any measure designed to effect compliance or to remedy the harm caused by a violation. With respect to remediation, the Administration recognizes that court-ordered remediation must have a net environmental gain and must not conflict with clean-up activities under other federal statutes. This view could be better supported if there were greater specificity in §§309(b) and 505 on this point.

Entitlement to Equitable Relief

Some cases have interpreted the CWA to require that the traditional common law test for issuance of an injunction must be met before a Federal court may enjoin violations of the CWA. The test for a permanent injunction is: (a) failure to issue the injunction

would result in irreparable injury; (b) legal remedies are inadequate; (c) issuance of the injunction is in the public interest; and (d) the benefits of enjoining the defendant outweigh the injuries that will result. This traditional equitable test can be difficult to meet in environmental cases in which evidence of environmental harm is often unavailable.

Anticipatory Enforcement

CWA §309(a)(3) authorizes EPA to issue an administrative order or commence a judicial action when a person "is in violation" of the CWA. The section does not expressly authorize EPA to act prior to a violation to prevent its occurrence or lessen the harm that may result from it. In contrast, many Federal laws authorize Federal agencies to enforce to prevent threatened or anticipated violations. For example, EPA is presently authorized to take enforcement action to prevent anticipated violations of the SDWA.

Recovery of Enforcement Costs

Currently, the CWA (and the Oil Pollution Act (OPA) for action taken under CWA §311) does not authorize the government to recover the costs of enforcement and oversight of cleanup and compliance measures. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and CWA §311 allow the United States to require responsible parties to conduct such clean-ups or to conduct its own cleanup of oil and hazardous substance spills financed by a government fund. CERCLA further allows the government to recover costs from responsible parties, including the costs of bringing enforcement and overseeing cleanups. Similarly, the OPA allows the government to recover removal costs from responsible parties.

In Rem Authority Over Polluters

Unlike many other statutes governing vessel owners or operators, §311 does not provide the government with in rem authority for enforcement. Many violators of §311 are asset poor, except for the vessels they own or operate, and in many cases such as those involving foreign violators, other assets are difficult to encumber. Enabling the U.S. to seize the assets of such violators is essential to control such offenders.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

Establishing Economic Benefit as a Minimum Penalty Requirement

- Amend CWA §§309, 311(b), and 404(s) to require that a court in a civil penalty proceeding, and an Administrative Law Judge in a class II administrative penalty proceeding, must, at a minimum, impose a penalty that recoups the economic benefit, if any, that accrued to the violator as a result of the violations. This rule would be subject to exceptions for cases against publicly and Federally owned treatment works. Further, amend these sections to revise the statutory maximum penalty in civil judicial cases such that whenever the economic benefit amount, if any, exceeds the statutory maximum of $25,000 per day of violation, the economic benefit amount will supersede the $25,000 per day of violation statutory maximum. Finally, require EPA to undertake a study of its economic benefit model, and its application to private and public entities.

Examples of Appropriate Injunctive Relief

- Modify CWA §§309(b) and 505(a) to specify the types of injunctive relief that are appropriate for the court to order, including remediation of environmental harm associated with violations through such measures that include (but are not limited to): removal of dredged or fill materials and contaminated sediments, clean-up of waterways and banks of waterways of illegally discharged pollutants, environmental auditing, installation of temporary or permanent treatment facilities, prohibition of additional sewer or wastestream connections, and temporary or permanent cessation of activities related to--and that caused--the violation. The cost of compliance with an injunction to remediate the environmental harm associated with violations should not be capped at the maximum civil penalty. In actions under §505(a), the court should be required to notify EPA and allow EPA an opportunity for comment before issuing an order requiring remediation of environmental harm, to ensure net environmental benefit from the remediation and to avoid duplication or inconsistency with clean-ups under other federal statutes.

Increase the Judicial Maximums for §311 Civil Penalties

To conform with increased administrative penalties under §311, increase civil judicial penalties authorities as follows:

- CWA §311(b)(7)(A) should be amended to increase the statutory maximum penalty available in a civil judicial action for discharge of a barrel of oil or

reportable quantities (RQ) of hazardous substance from $25,000 per day of violation and $1,000 per barrel of oil or RQ of hazardous substance discharged to "$100,000 per day of violation and $3,000 per barrel of oil or RQ of hazardous substance, whichever is greater." "Whichever is greater" should be added to clarify the existing, ambiguous language, not to increase the penalty calculus.

- CWA §311(b)(7)(D) should be amended to increase the statutory maximum penalty available in a civil judicial action for discharge of a barrel of oil or RQ of hazardous substance that results from gross negligence or willful misconduct from not less than $100,000 or not more than $3,000 per barrel of oil or RQ of hazardous substance discharged to "not less than $500,000 per day of violation and $5,000 per barrel of oil or RQ discharged, whichever is greater."

Entitlement to Equitable Relief

- Modify the Act to require a district court to issue an order for compliance upon a finding of liability in every CWA civil case, unless the defendant establishes a high probability that violations will not recur. The court would retain equitable power to fashion an appropriate remedy. Further, the traditional tests for determining whether to issue a temporary restraining order or a preliminary injunction would continue to apply.

Anticipatory Enforcement

- Modify CWA §309(a) to authorize EPA to issue an administrative compliance order and bring a civil action for injunctive relief for anticipated violations of the Act. To be actionable, an anticipated violation would have to be "clearly foreseeable." A compliance order issued for anticipated violations should be enforceable in court.

Recovery of Enforcement Costs

- Modify CWA §309 to authorize the Department of Justice, EPA, the Corps of Engineers, and the Coast Guard to recover from the violator the costs of bringing enforcement actions and of administering compliance and cleanup measures. Any costs recovered would be deposited into the U.S. Treasury. Also modify CWA §311(b) and §1002 of the Oil Pollution Act to authorize the Department of Justice, EPA, the Corps of Engineers, and the Coast Guard to recover from the violator the costs of bringing §311 civil judicial and administrative enforcement actions. Any such costs recovered under the OPA for activities under CWA §311 would be deposited into the Oil Spill Liability Trust Fund. These costs should not be recoverable in CWA administrative

enforcement actions brought by EPA, the U.S. Coast Guard, or the Army Corps of Engineers against Federal facilities.

Provide *In Rem* Cause of Action

- Amend §311(b)(6) to include a paragraph providing that any vessel operating in violation of §311 shall be liable for any civil penalty or criminal fine assessed for the violation. Amend §311(b)(7) similarly to provide for such a remedy in instances where an owner or operator has failed to comply with a response order issued under §311(c) or §311(e). Provide venue in any district court in which the vessel may be found.

MINOR/TECHNICAL CHANGES:

- CWA §309(e) requires the United States in any civil judicial enforcement action against a municipality to join as a party the State in which the municipality is located. The State is then liable for any judgment that might be imposed against the municipality, to the extent that laws of the State prevent the municipality from raising revenues needed to comply with the judgment. The purpose is to assure that municipalities are not prevented from complying with the CWA by funding restrictions imposed on them by the State. In many actions, however, the ability of the municipality to satisfy the judgment obtained against it is not in issue. In such cases, joining the State is unnecessary and only serves to increase litigation burdens on all concerned. Accordingly, CWA §309(e) should be modified to remove the requirement that the State always be joined as a party in suits brought by the U.S. against municipalities. Instead, §309(e) should give the U.S. discretion to seek to join States when State law could interfere with a municipality's ability to satisfy a judgment.

- Amend the CWA to assure that the five year statute of limitations applicable to penalties, set forth at 28 U.S.C. §2462, is not applicable to injunctive relief.

- CWA §509(b) precludes judicial review in an enforcement action of certain decisions by EPA, such as promulgation of certain regulations or issuance of a §402 NPDES permit, which could have been otherwise challenged in a separate judicial proceeding. The effect of this provision is to prevent, for example, a defendant from raising as a defense to an action for violating a permit that terms in the permit were improperly imposed. This provision should be extended to preclude judicial review in an EPA enforcement action of State decisions, such as State issuance of NPDES or 404 permits, which could have been otherwise challenged in State court.

- CWA §307(d) makes it unlawful to discharge wastes to a publicly owned sewage treatment plant in violation of any effluent standard or prohibition or pretreatment standard promulgated under §307. EPA has taken the view that ordinances enacted by a local POTW authority that are designed to ensure compliance with the POTW's approved pretreatment program ("local limits") are within §307(d)'s enumeration, hence are Federally enforceable. Sections 307(d), 309(a) and 309(c) should all be amended to clarify that all pretreatment standards and requirements, whether in Federal regulations, Federally issued pretreatment permits, federally approved State or local pretreatment programs, or State or local pretreatment permits issued pursuant to a Federally approved pretreatment program are all Federally enforceable in administrative, civil judicial, and criminal proceedings. This section should also be revised to state expressly that it covers violations by any person, regardless of whether that person is an owner or operator.

- Amend the CWA to authorize a court in judicial cases, and EPA, the Coast Guard, and the COE in administrative cases, to pay an award, out of penalties imposed, for information that results in imposition of a civil penalty for violations of the Act. Such awards would be made only if information provided materially assisted the United States in obtaining the civil penalty or injunctive relief and should be limited to a maximum of 45% of the penalty imposed by the court or hearing officer. EPA already has such authority under the Clean Air Act (CAA) and CERCLA.

- For purposes of calculating an appropriate civil penalty, add to the factors currently to be considered under CWA §§309(d), 309(g)(8), and 402(s)(4), "any penalty already assessed for the same violations." The economic-benefit minimum penalty could be reduced by any penalty already assessed for the same violation. Also amend §311 to change "any other penalty for the same incident" to "... same violations."

- Amend sections 404(s) and 309(g) to clarify the U.S. Army Corps of Engineer's authority to bring enforcement actions for unpermitted discharges of dredged and fill material in violation of CWA §301(a).

FEDERAL FACILITIES

ISSUE:

In April 1992, the U.S. Supreme Court ruled in Department of Energy v. Ohio, 503 U.S. --, 118 L.Ed.2d 255 (1992), that the United States had not waived its immunity to punitive penalties, i.e. penalties for past violations, under either the citizen suit provision or the Federal facility provision of the CWA or the Resource Conservation and Recovery Act (RCRA). In October 1992, partially in response to the DOE v. Ohio decision, Congress passed the Federal Facility Compliance Act which (1) waived the Federal government's immunity from penalties for violations of RCRA and (2) provided EPA with administrative order authority against Federal facilities. However, sovereign immunity under the CWA was left unaddressed by this legislation. How should the CWA be amended with regard to compliance of federal facilities?

BACKGROUND:

Federal Facility Compliance Rates Under the NPDES Program

In December, 1988, the General Accounting Office (GAO) released a report entitled *Water Pollution: Stronger Enforcement Needed to Improve Compliance at Federal Facilities*. The report stated that the Federal facilities' rate of noncompliance with CWA program requirements was twice that of non-Federal industrial facilities. Current compliance data indicates that improvements have been made in compliance since the 1988 GAO Report, but that Federal facilities consistently demonstrate higher Significant Non-compliance rates than private facilities. GAO cited the low priority that Federal facilities have assigned to compliance with pollution discharge requirements and corrective action as fundamental barriers to CWA compliance at these facilities.

The report also noted that both regulators and Federal agency officials agreed that enforcement actions against non-compliant Federal facilities resulted in increased priority of environmental compliance and prompt corrective action. EPA regional officials stated that the reason they do not often take enforcement actions against Federal facilities in authorized States, where the State does not act, is that the limited enforcement tools available to EPA at Federal facilities impede timely and effective resolution of enforcement actions. GAO noted a reluctance among EPA regional staff to use negotiated compliance agreements at Federal facilities and a tendency to rely on State administrative or judicial actions to ensure compliance. However, due to the DOE v. Ohio decision, incentives for State and citizen enforcement are limited (see discussion below). The Administration recognizes that enforcement is only one tool being used in achieving compliance at Federal facilities and supports efforts by Federal facilities to achieve compliance through pollution prevention, self auditing, and other efforts.

Department of Energy v. Ohio: Overview and Effect

On April 21, 1992, the United States Supreme Court held that Congress had not waived Federal sovereign immunity from liability for civil, "punitive" fines imposed by a State for past violations of the CWA. The Court distinguished between "punitive" fines and "coercive" fines, holding that Federal agencies could be liable for fines imposed by courts to induce them to comply with injunctions or other judicial orders designed to modify behavior prospectively. The Court determined that (1) §313 of the CWA does not subject Federal facilities to statutory penalties despite the word "sanction" in the section, and (2) fines provided for in State statutes that are part of a Federally approved State permit program do not "arise under Federal law" as required under the waiver of sovereign immunity set forth in the CWA. A subsequent case, Sierra Club v. Lujan, 972 F.2d 312 (10th Cir. 1992), further held that even when the Federal government has violated a permit issued directly by EPA "under Federal law," the result is the same--no waiver of sovereign immunity for punitive penalties.

Pursuant to these cases, States cannot obtain penalties from Federal facilities for past violations of the Act. Despite the GAO finding that enforcement actions against non-compliant Federal facilities result in increased priority of environmental compliance and prompt corrective action, the deterrent value of punitive fines is not in the arsenal of State and citizen enforcement tools. EPA's enforcement tools are also limited under the Act due to the absence of an effective administrative procedure for Federal facilities enforcement.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

- Amend §313 of the CWA to clearly waive the United States' sovereign immunity (for violations occurring after the effective date of the amendments) to allow citizens (including States acting as citizens) to seek penalties for **all** CWA violations by Federal facilities for which a private person would be liable and to allow States to obtain penalties for Federal facility violations of requirements in State water laws respecting the control and abatement of water pollution when those penalties would go to a State environmental trust fund. This amendment would parallel the Federal Facility Compliance Act, which clarified the waiver of sovereign immunity under RCRA.

- Amend §502(5) of the CWA to include the United States in the definition of "person." Amend §311(a)(7) to include the United States in the definition of "person" for enforcement purposes only.

- Amend §309 of the CWA to establish an administrative enforcement process, based on the §3008 of RCRA and the Federal Facility Compliance Act, that will allow EPA to: issue compliance orders to Federal facilities; enforce these orders through the administrative hearing process; and, assess penalties against Federal agencies for violations of the CWA and the orders.

    - This administrative enforcement provision would mirror the RCRA enforcement provision, creating a single administrative process for RCRA and CWA enforcement at Federal facilities.

    - The provision would ensure that Federal agencies have an opportunity to contest administrative orders through the administrative hearing process established at 40 CFR Part 22, thus granting Federal agencies access to a formal hearing similar to the judicial hearings available to non-Federal entities.

    - The respondent Federal agency should have an opportunity to confer with EPA prior to an order or a field citation against a Federal facility becoming final as is provided in the Federal Facility Compliance Act.

    - Citizen actions would be precluded to the extent that the Administrator or the Secretary of the Army had initiated and was pursuing or had completed an administrative enforcement action against a Federal facility for the same violation. In any such action interested persons should have an opportunity for notice, comment, and under certain circumstances, intervention. This preclusion would not apply to allegations of imminent and substantial endangerment in citizen suits unless the Administrator has commenced and is diligently prosecuting an administrative action against a federal facility under Section 504.

- All funds collected by a State from the Federal Government for violation of substantive or procedural requirements referred to in subsection (a) of section 313 of this Title would be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

- In any case, the amendments should not alter in any manner existing agreements, permits, compliance agreements, or administrative or judicial orders.

- The amendments should not affect existing provisions stating that Federal employees are not personally liable for civil penalties resulting from acts or omissions within the scope of their official duties, and that Federal employees, but not Federal departments or agencies, should be subject to criminal sanctions.

CRIMINAL ENFORCEMENT

ISSUE:

There are several important criminal enforcement issues which should be addressed by any reauthorization and amendment of the CWA. First, the knowing endangerment provision should be strengthened and improved, especially in light of two recent, unfavorable judicial decisions. Second, the felony sanctions for knowing violations of the Act should be increased, consistent with similar provisions in the hazardous waste and clean air areas. Third, the false statement provision should be improved. Finally, amendments are recommended with respect to disposition of criminal fine money, to permit citizen awards, fine-sharing with States.

Experience gained over time indicates that these and other criminal enforcement provisions require clarification, refinement, or upgrading, as set out below.

BACKGROUND:

CWA §309(c) provides that criminal sanctions can be imposed for four principal types of violations under the CWA: negligent violations; knowing violations; knowing violations that place another person in imminent danger of death or serious bodily harm; and, knowing false statements or tampering with a monitoring device required by the statute.

Criminal prosecutions under these provisions are intended to punish violators and deter future violations of the CWA. The threat of criminal sanctions for negligent or knowing failures to comply helps to ensure that those subject to the requirements of the CWA behave in an informed and attentive manner, and are held accountable if they do not.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

Knowing Endangerment

- Revise CWA §309(c)(3)(A) to overrule the result in United States v. Borowski, 977 F.2d 27 (1st Cir. 1992), reh'g denied (1993), which interpreted the knowing endangerment provision in an unduly restrictive manner. What the government should be required to prove for a knowing endangerment conviction is that the defendant committed a predicate felony and that he knew at the time that, in connection with, or in the course of, committing that crime he placed another person in imminent danger of death or serous bodily injury.

- CWA §309(c)(3) should be amended to provide that any knowing violation of the Act, punishable under §309(c)(2), is a predicate offense for knowing endangerment.

- Delete the subsection which provides for an affirmative defense to knowing endangerment based on "consent" and "reasonable foreseeability." The defense was developed originally to apply to a Title 18 knowing endangerment crime (never enacted), which did not include a predicate offense, but punished any conduct (whether illegal or not) that caused endangerment. The defense (which also appears in RCRA and the CAA) is inappropriate as applied to knowing endangerment crimes that require proof of a predicate offense. Moreover, it is poor public policy under any environmental statute to allow a person who has committed a felony to claim as a defense that another person consented to being a victim of that felonious act.

- Clarify that, for purposes of subsection 309(c)(3) only, "imminent danger" means the existence of a condition or combination of conditions which could reasonably be expected to cause a threat of death or serious bodily injury unless the condition is remedied. This is necessary to overrule the unfavorable decision in United States v. Villegas, 784 F. Supp. 6 (E.D.N.Y. 1991), conviction reversed on other grounds, (2d Cir. 1993) (petition for rehearing pending).

Felony Sanctions

- Amend CWA §309(c)(2) to increase the maximum sentence for knowing violations from the present maximum of 3 years to 5 years for a first offense (doubled for second offenses). In recent years, Congress has provided that knowing violations of the RCRA, and of the CAA, are punished as 5-year felonies. Crimes involving water pollution are as serious as air pollution or hazardous waste crimes, and sanctions should be equivalent.

Second offenses

- Amend CWA §309(c)(1), (c)(2), and (c)(4) to clarify that a previous conviction under any of these provisions, or under §309(c)(3), will result in enhanced "second offender" sanctions upon subsequent prosecution under any of these provisions.

False Statements

- Amend CWA §309(c)(4), in a manner similar to its CAA and RCRA counterparts, to attach felony sanctions to knowing acts of omission and to increase sanctions to 5 years of imprisonment and $50,000 per day of violation

with a doubling of maximum sanctions for second offenses. This should include the knowing omission of required material information from required documentation, certifications, or reports; knowing failure to maintain required records; and knowing failure to install, operate, or utilize required monitoring methods, equipment or devices.

Disposition of fines

- Add to CWA §309(c) a new provision authorizing the court, upon recommendation of the United States, to pay awards from fines assessed, to persons providing information that results in criminal conviction for violation of the CWA. Such awards would be made only if information provided materially assisted the United States in obtaining the criminal conviction. For examples of citizen award provisions, see, CERCLA, the CAA, the Act to Prevent Pollution from Ships, the Refuse Act, and the Endangered Species Act. Such provisions can aid Federal law enforcement efforts by providing citizens with extra incentives to report possible violations of the relevant laws.

- Add to CWA §309(c) a new provision authorizing the court, upon recommendation of the United States, to pay any State or municipality giving material support to the prosecution, a portion of the fine assessed. The U.S. has received invaluable assistance from State and local agencies in a number of its prosecutions, but providing such assistance can be very expensive to State and local governments given their resource limitations. State and local governments would be more inclined to support federal efforts if those resource expenditures were more likely to be returned to them.

IMPROVING ADMINISTRATIVE ENFORCEMENT

ISSUE:

Effective administrative enforcement measures under the CWA are essential for aggressive and efficient enforcement against polluters. EPA and Coast Guard experience with CWA administrative enforcement has demonstrated that there are several areas where administrative enforcement mechanisms can be enhanced, and has resulted in identification of several amendments that are essential to effective implementation of the new enforcement regime.

BACKGROUND:

Administrative Penalty Cap

The $125,000 penalty limit on Class II administrative proceedings limits administrative enforcement efficiency by requiring EPA, the U.S. Army Corps of Engineers (COE), and the U.S. Coast Guard to refer cases assessing penalties in excess of this amount to the Department of Justice (DOJ) for filing in Federal district court. This requirement precludes EPA, COE, and the Coast Guard from using less resource intensive administrative penalty authority in many instances where it would be useful, appropriate, and less expensive to both the agency and the violator.

Class II Penalties for §311 Spill Violations

Potent deterrence against oil spills and hazardous substance discharge is an indispensable part of the Administration's enforcement strategy under the CWA. The U.S. faces increasingly serious environmental threats from the predominance of foreign flag tankers operating in U.S. waters, as well as the aging infrastructure of transportation-related and non-transportation-related pollution sources. Eighty-five percent of vessels entering U.S. ports are foreign flag. The Congress has highlighted their interest in vigorous enforcement against substandard vessels, especially tankers. Effective administrative enforcement against spill violations under §311 is critical to hold foreign flag ships to the same standard of accountability as domestic facilities regulated under §309.

The current Class II administrative penalty authority is not an effective deterrent against numerous "medium-sized" spill violations, which clearly warrant higher penalties envisioned by the Class II option, but do not normally warrant the resource intensive judicial civil proceeding envisioned for the most grievous spill violations ("major spills"). The maximum penalty of $10,000 per violation per day for spill violations is weak and unwieldy for the vast majority of "medium-sized" oil spills. Because of the nature of most 311 spill violations, the duration of the discharge violation rarely exceeds one day, effectively capping the Class II maximum penalty at

the Class I level of $10,000 per violation. The glaring defect in the Class II penalty authority is the absence of the volumetric spill sanction, "per barrel of oil or unit of RQ," currently provided only in the judicial civil penalty forum. The omission of this scheme for administrative penalties hampers EPA and Coast Guard ability to apply the most efficient and effective enforcement tool against these more serious spill violations.

Class I Penalties for §311 Spill Violations

The current Class I penalty authority is a very weak deterrent in comparison to comparable environmental and transportation safety statutes, such as the Act to Prevent Pollution from Ships, the Marine Plastic Pollution Research and Control Act, and the Ports and Waterways Safety Act. These statutes allow hearing officers to award administrative penalties of up to $25,000 per violation, with no cap on total assessments. In contrast, the Class I authority under the CWA is limited to $10,000 per violation, with total assessments not to exceed $25,000, regardless of the number of violations. The CWA authority should be on par with these other statutes.

Overfiling Authority

The United States currently has authority to file its own judicial or administrative enforcement action even where a State is diligently pursing civil judicial remedies against a violator. However, the ability of the U.S. and citizens to "overfile" State administrative penalty actions is presently restricted under §309(g)(6). The recent decision of North and South Rivers Watershed Association, Inc. v. Town of Scituate, No. 91-1255 (1st Cir. 1991) broadly interpreted this restriction and barred a citizen enforcement action. EPA is concerned that this expansive interpretation of the bar to citizen enforcement actions will be applied equally to bar Federal enforcement actions, which would hinder EPA's State oversight and enforcement responsibilities.

Field Citations

CWA enforcement responsibilities have increased markedly in recent years, but enforcement resources have remained limited. As a result, there has developed a need to target enforcement resources more efficiently and to develop new and innovative approaches to enforcement. Current statutory authority requires EPA and the COE [relative to §404] to provide public notice before any administrative penalty action may be brought, and therefore precludes EPA and COE from implementing innovative approaches such as those in the 1990 amendments to the CAA, in which Congress enacted a provision that authorized EPA to implement a "field citation" program to assess administrative penalties for minor violations of the CAA without prior notice to the public. This authority would allow EPA and COE to broaden the scope of enforcement activities, address more violations, reallocate resources to more significant cases, and establish a greater regulatory presence. Field citations should

not be given any preclusive effect, but a court should consider them in assessing any subsequent penalty.

Penalties for Violation of Administrative Orders

EPA, the Coast Guard, and the COE are not authorized to seek administrative penalties for violation of an administrative order issued under §309 or §311. Enforcement of an administrative compliance order requires EPA, the Coast Guard, and the COE to seek civil judicial enforcement from a Federal district court. This procedure is slow, cumbersome, and resource intensive as compared to the administrative penalty process. The authority to assess administrative penalties for such violations would allow EPA, the Coast Guard and the COE to bring and conclude cases for violations of administrative orders more promptly, obtain higher penalties, and improve compliance earlier and with fewer resources. This procedure would fully comply with the requirements of due process because the validity of the compliance order could be challenged in any penalty, as well as in any appeal proceeding in Federal court.

State Consultation Defenses

Before assessing a Class I or Class II administrative penalty under §309 of the CWA, EPA must "consult" with the State in which the violation occurred. Under the present procedure, parties seeking review have objected to the degree of consultation between EPA and the State, and have sought to discover from EPA additional information regarding that consultation. The Administration believes that the adequacy of State/EPA consultation should not be a basis for a party seeking review to challenge the assessment of a penalty. Moreover, the Administration is concerned that releasing documents related to this consultation may reveal enforcement sensitive information.

Requests for Information

Section 308 of the CWA authorizes EPA to require the owner or operator of any "point source" to install monitoring equipment, sample effluents, maintain records, etc. The CWA regulates many persons, such as IUs of a POTW who have at times claimed that they are not subject to the provisions of §308 because they are not themselves owners and operators of a "point source." This issue has also arisen with respect to zero discharge facilities. The Administrator should have clear authority to request information from all persons regulated under the Act, including industrial users and zero discharge facilities.

Subpoena Authority

While EPA has authority to obtain information from owners and operators of point sources, the power to compel oral responses to oral questions through the use of a

subpoena is essential in certain types of investigations. The ability to compel testimony is an extremely effective means to discover information from an uncooperative or adversarial source. Under current law, both EPA's ability under §308 of the CWA to issue subpoenas, and the Coast Guard's ability under §311, is limited.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

Administrative Penalty Cap

- Amend §§309(g)(2) and 311 (b)(6)(B) to increase the administrative penalty caps from $125,000 for class II penalties to **$300,000**, and from $25,000 for class I penalties to **$100,000**. The cap on class II penalties should also be subject to waiver upon agreement of EPA, the Army Corps of Engineers, or the Department of Transportation, as appropriate, and DOJ, similar to the waiver in Section 113(d) of the Clean Air Act.

Volumetric/ Enhanced Establish Administrative Penalties under §311

- Amend §311(b)(6) to provide potent administrative penalty sanctions against spills and other serious environmental violations by vessels and transportation related sources in U.S. waters. Provide a volumetric administrative penalty sanction for class II enforcement authority up to $2000 per barrel of oil or unit of reportable quantity of hazardous substance discharged, and for class I up to $1000 per barrel of oil or unit of reportable quantity of hazardous substance discharged. Increase class II "per day per violation" penalty from $25,000 to $50,000 and class I "per violation" penalty from $10,000 to $25,000. This change would put class I penalty authority on par with related statutes.

- There should also be a separate clause in §311(b)(6) providing for the assessment of a Class I $25,000 penalty per violation per day for violations of §311(j) in place of the present $10,000 per violation penalty up to the amount of the administrative penalty cap. Section 311(j) violations involve spill prevention violations rather than a discharge of oil or hazardous substance, making it incongruous to provide an option of assessing penalties per day of violation or per unit of substance discharged for §311(j) violations.

Overfiling Authority

- Amend §309(g)(6)(A) to delete the provisions by which certain State administrative enforcement actions may bar a Federal judicial or administrative enforcement or citizen suit action.

Field Citations

- Amend §309 of the CWA to waive the public notice requirement for Class I administrative penalties, of $25,000 or less, giving EPA and the COE the discretion to develop, as appropriate, an effective field citation program for EPA and COE personnel. Where a field citation is issued against a Federal facility, a conference between the Administrator, or the Secretary of the Army, as appropriate, and the Secretary of the respondent Agency should be provided prior to final penalty assessment.

Penalties for Failure to Notify

- Amend CWA §311(b)(6) and (b)(7) to provide for administrative and judicial civil penalties for failure to notify the United States of illegal discharges of oil or a hazardous substance. Currently, §311(b)(5) provides for criminal penalties only.

Penalties for Violation of Administrative Orders

- Amend sections 309(g) and 311(b)(6) to provide EPA, the Coast Guard, and the COE with authority to assess administrative penalties for violations of a previously issued administrative order.

State Consultation Defenses

- Amend §309(g) to prevent a party seeking review from challenging an administrative penalty on the ground that State/EPA consultation was inadequate.

Requests for Information

- Amend §308(b) to authorize EPA to obtain information and access from any person subject to regulation under the CWA.

Subpoena Authority

- Amend §509 and §311(m) to authorize EPA and the Coast Guard to issue subpoenas to for the purposes of enforcing the Act.

CLEAN WATER ACT CITIZEN SUITS

ISSUE:

Recent court decisions have significantly diminished the deterrent threat posed by citizen enforcement under the CWA. These decisions have narrowly interpreted citizen standing to sue by limiting the right to bring suit to instances of "ongoing" violations. At least one State has eliminated a citizen's right to challenge a State-issued NPDES permit. Also, the purpose for U.S. review of proposed consent judgments in citizen suits needs clarification.

BACKGROUND:

Requirement of "ongoing" violations

Section 505(a) of the CWA authorizes a citizen to commence a civil suit against a person "who is alleged to be in violation of" an effluent standard or administrative order. Interpreting this language, the Supreme Court held that §505 does not permit citizen suits for wholly past violations in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987). The Supreme Court decision in Gwaltney has both weakened and complicated citizen enforcement under the CWA. The decision has also created complex questions related to penalty assessment. These types of issues are being litigated repeatedly in the Federal courts.

Congress has previously acted to assure the continued vitality of the citizen environmental enforcement effort. In 1990, Congress amended the CAA citizen suit provision to enable citizens to commence an action against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation" of the CAA. In amending the CWA, the Administration seeks to allow citizen suits for any past violation or set of violations, while at the same time recognizing the equities associated with the imposition of penalties for some wholly past violations.

Citizen challenges to State-issued NPDES permits

Pursuant to §402(a) of the CWA, EPA is authorized to issue NPDES permits regulating discharges of pollutants by point source dischargers. Under §402(b), EPA may authorize a State to operate the permitting program within its borders. When EPA prepares to issue a permit, that process is initially determined by EPA regulation, 40 C.F.R. Parts 122 and 124. Under CWA §509(b)(1) and these regulations, "any interested person" is entitled to challenge EPA's permitting decisions through a request for an administrative evidentiary hearing and if necessary an appeal of EPA's decision to Federal court.

Determinations about which parties have standing to challenge the issuance of a State issued NPDES permit is a matter of State law. The "any interested person" language of the CWA does not explicitly apply to State issuance of permits. Consequently, at least one State has very narrowly construed who may challenge permit issuance such that citizens are effectively excluded from the process.

EPA and DOJ Review of Proposed Consent Judgments

Most citizen enforcement suits brought under the CWA are resolved via a consent decree that is negotiated by the parties and presented to the court for entry as an enforceable order of the court. Under §505(c)(3), "[n]o [citizen suit] consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following receipt of a copy of the proposed consent judgment by the Attorney General and EPA." This provision provides no guidance to EPA or DOJ as to what the government is supposed to do with the consent judgments during the 45-day period. Adding language explaining the role of the government would be helpful in assuring that the court understands the role of the United States in this process.

RECOMMENDATIONS:

That Administration recommends that the CWA be amended as follows:

Requirement of "ongoing" violations

- Modify the citizen suit provision of the CWA to assure that citizens may maintain suit for all past violations, occurring after the effective date of the amendment, that have occurred during the 5 year statute of limitations period. Further, amend the penalty assessment criteria in CWA §309(d) to require that a federal District Court consider, when assessing penalties against a person that is no longer in violation, the following factors (in addition to the existing factors): (1) the duration of the violator's continuous compliance and non-compliance, (2) the efforts of the violator to comply both prior to and after the violations at issue, (3) the diligence of the violator in preventing the violations at issue, and (4) the likelihood of recurrence of violations.

Citizen challenges to State-issued NPDES permits

- Modify the CWA to assure that "all interested parties" are provided the right and opportunity to challenge in State court any State-issued CWA permit.

EPA and DOJ Review of Proposed Consent Judgments

- Modify §505(c)(3) making explicit that the United States' role in reviewing proposed citizen suit consent judgments is to determine its consistency with

the purposes and requirements of the CWA and that the court is to consider the United States' views in deciding whether to enter a proposed consent judgment. The statute should provide that a court shall not approve any proposed consent judgment that is inappropriate, improper, inadequate, or inconsistent with the purposes and requirements of the Act. Also, instruct the court to consider the penalty factors contained in Section 309(d) of the Act in determining whether the agreed-upon penalty is sufficient to further the deterrence purposes of the Act.

Criteria for Approval of Consent Decrees

- Amend Section 505 by adding a new subsection providing guidance to courts concerning the appropriate standard to apply in reviewing a proposed consent judgment in a citizen suit. The section should clarify that a court shall not approve any proposed consent judgment that is inappropriate, improper, inadequate, or inconsistent with the purposes and requirement of the Act. Language should also be included instructing the court to consider the penalty factors contained in Section 309(d) of the Act as well as any views expressed by the United States in deciding whether to approve a consent decree.

Other Suggestions

- Amend CWA §505(f) to assure that citizens are authorized, as the federal government is authorized under §307(d), to sue for: (a) violations of both pretreatment requirements and pretreatment standards (see infra discussion concerning CWA §307(d) and (b) violations of §404 permits.

- Currently, State administrative penalty actions under State laws comparable to Section 309(g), when diligently prosecuted, preclude citizen suits seeking penalties for the same violations. We are seeking to remove that bar so that citizens (and EPA) could overfile State administrative penalty actions. We propose a more limited change to the analogous provision in Section 505 with respect to State court enforcement actions. We suggest amending Section 505(b)(1)(B) to add the words "that has a permit program approved under Section 1342(b) of this title" after "if the administrator or State." This amendment would ensure that citizen suits under the CWA would be barred only by civil enforcement actions by those States with EPA-approved permit programs. This amendment would also ensure that a citizen suit would not be precluded by a State court action that lacks the procedural protection, such as allowing public participation in the proceeding, that is required of State enforcement under EPA-approved programs. See 40 C.F.R. 123.27(d). Of course, under the language of Section 505(b), the State would also have to be "diligently prosecuting" its enforcement action to bar a citizen suit.

CLEAN WATER ACT IMMINENT AND SUBSTANTIAL ENDANGERMENT PROVISION

ISSUE:

The CWA, as interpreted by the courts, does not provide adequate authority to EPA or the public to address water pollution that poses a threat to human health or the environment. The imminent and substantial endangerment provision of the statute is narrower in its application than the more modern provisions in other environmental statutes.

BACKGROUND:

Imminent and Substantial Endangerment

Section 504 of the CWA authorizes EPA to respond to emergencies where there is an imminent and substantial danger to the public health or economic welfare. Emergency provisions are also found in the Safe Drinking Water Act (SDWA), §1431, CAA, §303, RCRA, §7003, CERCLA §106, and §311(e) of the CWA (regarding oil and hazardous substances). Each of the provisions is different. In several respects, §504 provides EPA with less authority than that provided by the emergency provisions of any of these other statutes.

For example, under §504 of the CWA, EPA is not authorized to issue administrative orders, but must seek enforcement of the provision in Federal court. In contrast, §1431 of the SDWA and §303 of the CAA authorize EPA to issue "such orders as may be necessary to protect the health of persons". Section 7003 of RCRA authorizes EPA to issue "such orders as may be necessary to protect public health and the environment." Procedures for judicial enforcement of such orders are also established in §1431 of the SDWA, §303 of the CAA, and §7003 of RCRA. The enforcement options available under the SDWA, RCRA, and §311 go beyond administrative orders and suits. Section 1431 of the SDWA authorizes EPA to "take such actions as he may deem necessary" to protect the health of persons endangered by public water system contaminants. §7003 of RCRA also authorizes EPA "to take other action."

Section 504 of the CWA may only be invoked when there is endangerment to human health or welfare. However, endangerment to welfare is restricted to endangerment to "livelihood," such as "the inability to market shellfish." Section 504 does not identify environmental protection as a justification for invoking EPA's authority. In contrast, the analogous section in the CERCLA, §106, authorizes a response when there is endangerment to "public health or welfare or the environment". Similarly, §7003 of RCRA authorizes EPA to take action when there is endangerment to "health or the environment". CWA §311(e) can be used when there is imminent and

substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, public and private property, shorelines, beaches, habitat, and all living and nonliving natural resources under the jurisdiction of the United States.

Section 504 of the CWA provides that EPA's emergency powers are triggered only when a pollutant source "is presenting" an imminent and substantial endangerment. In contrast, §1431 of the SDWA, §7003 of RCRA and §106 of CERCLA and §311(e) of the CWA provide a lesser threshold that allows EPA to respond to threatened emergencies. It is not clear, as in §7003 of RCRA, that EPA may take actions where a past discharge may present an imminent and substantial endangerment. Clarification of this point is important because in many instances it is the accumulation of pollutants in sediments from past discharges that pose the endangerment.

Amending §504 to incorporate elements of the other statutes' "emergency powers" provisions would provide several benefits. First, it would ensure the same level of protection of public health and the environment under the CWA as provided under other environmental statutes in comparable emergency situations. Second, it would broaden EPA's enforcement options. In addition, conforming §504 to the other statutes' provisions would reduce the administrative and judicial burden of interpreting and applying widely differing statutory provisions in a crisis.

Assuring Public Ability to Respond to Emergencies

Under the emergency provision of the CWA, only EPA has authority to initiate an action in response to a threat or endangerment to the public health or welfare. No provision is made in §505 of the Act to grant citizens the right to bring a suit under these circumstances. This authority is provided to citizens bringing suit under the citizen suit provision of RCRA §7002(a)(1)(B).

Because at present the public has no direct means to seek redress for water pollution problems other than those caused by point source dischargers or dischargers to POTWs, it is important that the public have authority to enforce CWA §504.

RECOMMENDATIONS:

- CWA §504 should be amended to:

  - o include elements of other Federal environmental statutes' emergency powers provisions, including a provision empowering EPA to issue enforceable emergency orders;

- o authorize EPA to initiate an emergency action in response to a threat posed to the environment;

- o clarify the law to allow EPA to invoke §504 when the discharge "may present" an imminent and substantial endangerment to public health or the environment;

- o provide that the emergency powers provision applies to any person, not just those specified in §§504 and 311(e);

- o provide for administrative and/or civil judicial penalties for violations of an emergency order, as well as appropriate injunctive relief.

- o provide that knowing violations of §504 emergency orders be subject to criminal sanctions.

- ▸ CWA §505 should be amended to allow citizens to initiate actions to abate imminent threats to the public health, welfare, and the environment. Citizens acting to abate these threats should give notice, but should not be subject to the CWA §505(b)(1)(A) sixty day waiting period.

CLEAN WATER ACT SECTION 311: OIL AND HAZARDOUS SUBSTANCES

ISSUE:

Close coordination between EPA and the Coast Guard on development of new civil and administrative penalty programs under Section 311 has resulted in identification of several amendments that are essential to effective implementation of the new enforcement regime.

BACKGROUND:

CWA §311(j)(1)(C) authorizes EPA to require facilities to develop spill prevention, control and countermeasure (SPCC) plans. There are several deficiencies, however, in §311's provisions for enforcing these requirements. First, §311 does not expressly authorize EPA to seek the issuance of injunctions from the courts to compel compliance with the 311(j) requirements. Second, EPA and the Coast Guard are not specifically authorized to issue administrative compliance orders mandating §311(j) compliance, unless they demonstrate that the facility's failure to do so presents an imminent and substantial threat. Third, there are no criminal sanctions for negligent and knowing violations of §311(j) requirements, except for situations where false material statements, representations, or certifications are made. See CWA §309(c)(4).

Although information gathering authority is available to EPA under both sections 308 and 311(m) of the CWA for spill violations, the §311(m) authority is not enforceable by sanctions. This is a particular disadvantage to the Coast Guard, which cannot employ §308.

RECOMMENDATIONS:

The Administration proposes that the CWA be amended as follows:

<u>Improve §311(j) Enforcement Remedies</u>

- Additional enforcement authority for violations of CWA §311(j) should be added to CWA §§309(c) and 311(b). Specifically, these sections should (1) authorize EPA and the Coast Guard to issue administrative compliance orders mandating §311(j) compliance, (2) authorize courts to issue injunctions to compel compliance with spill prevention requirements, and (3) authorize criminal sanctions for negligent and knowing violations of §311(j) requirements.

Make §311 Information Requests Enforceable

- Section 311(b)(6) should be amended to provide authority to impose both Class I and Class II administrative civil penalties for a failure to comply with an information request under §311(m)(2). §311(b)(7) should be revised similarly to include authority to seek $25,000 per day penalties for violations of such an information request.

ADDITIONAL RECOMMENDATIONS:

Clarify Jurisdiction Under Section 311

- Clarify that the government has enforcement authority against discharges occurring in the U.S. exclusive economic zone with the proviso that this jurisdiction will be exercised consistent with international law. Several steps may be necessary to accomplish this change. First, a definition of "exclusive economic zone" consistent with other statutes should be added. Second, "exclusive economic zone" should be substituted for the term "contiguous zone" in section 311(b)(3)(ii) and (m)(1)(a), while specifically preserving Coast Guard authority under 14 U.S.C. §89(a). Third, a savings clause similar to that in the Act to Prevent Pollution from Ships also should be added in order to avoid any international law conflicts.

- Add a definition of the phrase "adjoining shoreline" to §311(a) of the CWA to clarify that the term includes all land areas upon which oil or hazardous substances have been discharged if the spill is either into or threatens navigable waters. The meaning of adjoining shoreline has become much more significant with the 1990 OPA amendments that created a volumetric penalty scheme, since the most oil spilled is near, but not into, waters of the United States.

- Amend CWA §311(a)(6)(C) to include abandoned vessels and abandoned on-shore facilities in the definition of entities subject to §311 regulation. Currently, only abandoned off-shore facilities are included in the definition, creating a loophole for former owners and operators of abandoned on-shore facilities.

- Provide for venue in any district in which a corporate defendant does business. Clarify that venue over a claim related to failure to report a spill exists where the spill occurred.

- The definition of "United States" in §311(a)(5) should be amended to conform to the definition of §1001(36) of OPA, so that it includes within it the term "United States" as well as the various States and territories.

CONTRACTOR LISTING

ISSUE:

How can the contractor listing program under CWA §508 be improved through changes in the statute?

BACKGROUND:

CWA §508 provides that any facility owned, leased or supervised by a person convicted under the CWA is ineligible to receive Federal funding until the condition which gave rise to the conviction is corrected.

The provision correctly recognizes that economic factors play a major role in both motivating and reforming human conduct. The purpose of this provision is to prevent the government from contracting with environmental criminals. This provision was intended to remove any and all economic incentive to violate the statute. However, under the current provision, companies are able to avoid listing and retain economic benefits by transferring an about-to-be convicted supervisor who committed criminal acts. In addition, some companies violate the CWA at marginally profitable or unprofitable sites and then abandon those sites and move business operations to other locations after obtaining the competitive benefits of noncompliance. Also, the regulated community is not required to assume affirmative responsibility related to certifying eligibility for Federal contracting.

Clarification of the CWA's provisions with respect to Federal procurement and contractor listing would result in greater efficiency for contractor listing and less likelihood of Federal money being spent to support environmental offenders. CWA §508 should be retained in its present form, authorizing the President to exempt any contract, loan, or grant where he determines such exemption is necessary in the paramount interest of the United States.

RECOMMENDATIONS:

- CWA §508 should be amended to provide mandatory listing for criminal violations of the Rivers and Harbors Act of 1899, 33 U.S.C. §§403 and 407, as well as the CWA.

- In addition, the statute should clarify the broad discretionary authorities of EPA. The statute should authorize EPA to: define the scope of the program; provide for listing of a convicted person acting as a supervisor; provide that actions of such supervisors are a proper basis for mandatory listing of the facility that employs that person; and, allow EPA to consider the supervisory status of the

person at the time of violation, not conviction, as an appropriate determining factor for listing consequences of a criminal conviction.

- The statute should authorize EPA to use its discretion to define the extent of the contracting prohibition with respect to activities, ownership, or operations by the convicted person. Thus, EPA could define "facility" within the context of each conviction and bring to justice those companies that fail to comply and then move their business. Such discretionary authority for EPA would be consistent with CAA §306(a) that provides EPA with authority to extend the prohibition against contracting and Federal procurement use of a facility to other facilities owned or operated by a convicted person.

- The Administrator should also be permitted to remove a facility from its list of violating facilities whenever the Agency is satisfied that the conditions which gave rise to the civil or criminal violations have been corrected. A mandatory listing of a particular period of time could constitute a serious disincentive to voluntary reporting and prompt correction of CWA violations.

- The statute should require companies that have been convicted, or whose owner, operator, or supervisor has been convicted of violating §309(c) of the CWA or the Rivers and Harbors Act, 33 U.S.C. §§403 and 407, to disclose the fact of that conviction when making certifications of eligibility for Federal grants, loans and contracts. Current certifications ask if a facility to be used for the grant or contract purpose is "on the EPA... List," which is a reference to the procedure which has been established by EPA under subsection (b) and is a legal conclusion. Companies may be unaware or may assert that they were unaware of their status with respect to the published list, despite the automatic statutory ineligibility contained in CWA §508(a). Every company, however, should at least know if it, or an owner, operator or supervisor, has been convicted of criminal violations of the CWA or other statutes, since the fact of Federal criminal convictions are usually noteworthy events in any existence, corporate or personal.

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

ISSUE:

Should there be an explicit statutory authority for courts to approve a consent judgment or settlement requiring that a portion of a civil or administrative penalty agreed upon by the parties be used by the violator to pay for an environmentally beneficial project?

BACKGROUND:

An innovative way to enhance environmental protection and fund beneficial projects would be to authorize courts, in appropriate circumstances, to approve a consent judgment or settlement under which civil violators would agree to beneficial environmental projects in the area where the violations occurred. Courts however would not have discretion in civil cases to order such projects absent agreement of the parties. Current EPA policy permits the Agency, in the course of settlement negotiations with a civil defendant or respondent, to reduce the amount of cash in the total penalty assessed where the violator agrees to complete a "supplemental environmental project" (SEP) to ensure that, for example, environmental restoration, pollution prevention, or public education and awareness programs in the violator's locality are funded and supported. The SEP must have a nexus, broadly defined, to the violations committed by the defendant. In addition, EPA SEP policy requires that a violator pay a substantial monetary penalty. In no case would a reduction of the cash penalty of more than one dollar penalty for one dollar SEP be acceptable.

Courts, however, would not have discretion in civil cases to order such projects absent agreement of the parties. This is not an appropriate role for the courts. Courts are competent only to adjudicate disputes. Unlike the EPA, courts have no particular expertise in environmental restoration or pollution prevention. They are not, and should not become, funding organs, dispensing largess among competing social, moral, and political interests--a quintessentially legislative function. Moreover, it would unduly complicate enforcement actions if the parties had to brief the court with respect to the possible uses of the penalties for environmentally beneficial projects. Furthermore, in some cases, it could appear inappropriate for a court to order one party to make a payment to private individuals not involved in the lawsuit even if for an environmentally beneficial project. Competition among claimants as to judicial largess could expose courts to conflict of interest charges and cast doubt on their neutrality.

When parties agree to an environmentally beneficial project in the context of a consent judgment in a civil suit, these concerns are substantially reduced, and are outweighed by the benefits to be gained from such a project.

SEPs must improve the injured environment or reduce the total risk burden posed to public health or the environment by the violations at issue, and under no circumstances could agreement to a SEP provide the violator with additional time to correct the violation and return to compliance. The project should not be an activity which is otherwise required by law. Providing courts with authority to approve SEPs in lieu of a portion of the total cash penalty assessed in the above contexts could lead to significant environmental improvement in the areas where violations occurred, without the expenditure of scarce Federal resources.

In a criminal case it is generally inappropriate to allow a defendant to enjoy a reduced criminal fine by agreeing to pay a portion of that fine for an environmental project. The payment of criminal fines carries the stigma of criminal conviction, and this stigma should not be lessened by the public perception of environmental munificence that may attach to the funding of an environmental project.

RECOMMENDATION:

- The CWA should be amended to clarify that, notwithstanding contrary provisions of law, in addition to the payment of a cash penalty that recovers at minimum the economic benefit of the violation, a Federal court may authorize--as part of a consent decree or settlement in an EPA civil judicial action or citizen suit--that the violator complete a SEP to improve the environment or public health. (Recovery of economic benefit in cash as a prerequisite to allowance of a SEP would not apply in cases against POTW or Federal facilities.)

ENVIRONMENTAL AUDITS

ISSUE:

Environmental audits could be an effective process by which regulated facilities would identify systemic obstacles to compliance as well as opportunities for pollution prevention. Mandatory environmental auditing is somewhat controversial due to the cost implications of facility-wide audits performed in accordance with Federal guidelines and regulations. However, clarifying EPA's authority to require an audit upon a finding that a person is in violation of the Act could serve as a strong deterrent against future violations by the facility and could help ensure that appropriate measures were taken to address the violations at issue. Should EPA's authority to require environmental audits be clarified under the CWA?

BACKGROUND:

In 1986, EPA issued an Environmental Auditing Policy Statement in which the Agency acknowledged the value of environmental auditing "... by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards." This document also suggested the use of environmental audits in the enforcement context. Also in 1986, EPA issued guidance on the inclusion of environmental auditing provisions in enforcement settlements. EPA has continued to consider the appropriate use of environmental auditing for enforcement purposes. The possible uses of these audits are many, but in the enforcement context the Agency has identified two uses that would prove extremely valuable. First, environmental audits may be used to determine the causes of CWA non-compliance; and, second, the parties may negotiate environmental audits of the defendants' facility as a term of settlement. Audits conducted in the context of such settlement determine the causes of the past non-compliance and assure that the means are identified and implemented.

Compliance audits could be required whenever the level of non-compliance at a facility is so severe that it indicates that the regulatee is unable or unwilling to take the steps to comply with the Act. These audits would assist the United States in any related enforcement action by providing information about the causes of and the solutions to the violations, information that the United States needs in order to properly resolve an enforcement action.

EPA has also examined the potential for auditing to be used a tool for identifying opportunities for pollution prevention. In this context the audit would be used to identify opportunities for pollution prevention within production and treatment processes and operation and maintenance practices at the facility. Pollution prevention opportunities identified in the audit could also be given due consideration by the regulator during any re-issuance of permits. All information submitted pursuant

to any audit could be available for public review unless EPA determined it to be confidential business information or otherwise inappropriate for public distribution.

RECOMMENDATION:

- CWA §§309(a) and 311 should be amended to expressly clarify that, upon a finding that a person is in violation of the Act, EPA or the Coast Guard may order a person to conduct and provide EPA or the Coast Guard with an environmental audit. A court will continue to have authority to order an audit in criminal and judicial cases where such relief is appropriate.

MISCELLANEOUS AND TECHNICAL ISSUES

ISSUE:

There are numerous miscellaneous issues and some technical drafting problems with the CWA as currently enacted. A discussion of these issues follows.

BACKGROUND:

It is presently unclear whether a discharge to the ground or to ground water that rapidly moves into surface water through a "direct hydrological connection" between the point of discharge and the surface water is subject to NPDES regulation. On occasion, EPA has asserted NPDES jurisdiction over such discharges. Case law, however, is divided on whether the CWA permits such jurisdiction. Compare, e.g., M.E.S.S. v. Weinberger, 707 F. Supp. at 1196 with Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich 1985). The ability to regulate discharges from identifiable point sources, such as infiltration basins located close to waterbodies, that will rapidly end up in surface waters through a direct hydrological connection is important if EPA is to protect water quality.

The 9th Circuit Court of Appeals held in Northwest Environmental Advocates v. City of Portland, (Civ. No. 92-35044, December 10, 1993), that a citizen could not bring suit under §505 for violation of a narrative NPDES permit condition providing that, notwithstanding any other limits in the permit, the discharge could not cause a violation of State water quality standards in affected receiving waters. The court reasoned that citizens can only bring suit under §505 for violations of "effluent limitations" in NPDES permits and held that a narrative receiving water limit is not an "effluent limitation and is therefore unenforceable." The court held that only end-of-pipe limits are "effluent limitations."

EPA is very concerned about the holding in Northwest Advocates being extended to Federal enforcement under §309, which is similarly worded to §505. In some circumstances EPA depends on non-numeric or narrative receiving water limitations to ensure protection of water quality when drafting numeric end-of-pipe limits is difficult or impossible. The Administration acknowledges the need for specificity in narrative limitations adequate to inform the permittee of the level of performance that constitutes compliance.

States' programs are not now statutorily required to develop or implement a policy of requiring State-imposed penalties to recoup the economic benefit of noncompliance. States should abide by the same penalty standard applicable to the United States in its CWA enforcement actions.

MAJOR SUBSTANTIVE RECOMMENDATIONS:

The CWA should be amended to:

- Confirm and clarify that a point source discharge to ground or to ground water that has a direct hydrological connection with surface waters is subject to regulation as a NPDES point source discharge if there is 1) a reasonably foreseeable direct hydrologic connection to surface waters in the proximity of the release, 2) a greater than de minimus quantity of the pollutant must reasonably be able to reach the surface water, and 3) no other Federal statute directly addresses the activity causing the release.

- Confirm and clarify that narrative and numeric end-of-pipe limits and receiving water limitations, both narrative and numeric, incorporated into NPDES permits are enforceable.

- Authorize EPA to withhold water pollution control assistance under §106 from those States that lack adequate authority to abate violations or fail to implement that authority, including that each State develop and implement a policy that would seek to recoup economic benefit (if any) in any penalty imposed by a State court or State administrative agency from all violators other than publicly-owned treatment works or federally-owned treatment works.

MISCELLANEOUS AND TECHNICAL CHANGES TO THE CWA:

- CWA §505 should be amended to specify that citizens alleging unpermitted discharge and similar violations may amend their complaints to allege additional violations without having to issue a new 60-day citizen suit notice, as long as the citizens did not know of the additional violations at the time the complaint was filed, and the new violations are closely related to the violations stated in the notice.

- Clarify that under CWA §309(g)(8) persons seeking to bring a judicial challenge to a class I administrative penalty order must file a complaint as well as a notice of appeal. Further amend §309(g)(8) to clarify that the court, on an appeal of an assessment of an administrative penalty, be restricted to remanding the penalty to EPA or Secretary on a finding of abuse of discretion, and restricting the court from imposing additional penalties on its own initiative.

- Amend CWA §502(6) to indicate that specific itemization of pollutants is illustrative only and not meant to be an exhaustive, exclusive listing of what constitute pollutants. Also, "fill material" and "dirt" should be added to the illustrative list. "Manufactured items or products" should be added to the list

to illustrate that discarded consumer products, such as refrigerators, are pollutants.

- Amend CWA §509 to clarify the fora for judicial review of EPA and COE actions, and to bring the section into line with other environmental statutes administered by EPA that provide for review of most final Agency actions in the United States courts of Appeals. Section 509 should be amended to add the following classes of actions to the list of actions that are reviewable in the United States Courts of Appeals: all regulations promulgated pursuant to the Act, approvals of State water quality standards, approval or establishment of total maximum daily loads under Section 303(d), and final permit determinations under Section 404 [including EPA actions under section 404(c)]. Because Section 509 will encompass review of COE actions under Section 404, the provision should be amended to indicate that actions taken by the Secretary of the Army are subject to the provision's review procedures.

  Additionally, Section 509 should be amended to provide that all actions reviewable in the United States Courts of Appeals that are of nationwide scope and effect should be reviewable only in the Court of Appeals for the District of Columbia Circuit, and actions of less than nationwide scope and effect are to be reviewed in the Court of Appeals in the federal district in which any of the waters affected by the Agency action are found. In order to avoid litigation over whether an Agency action is of national scope and effect, Section 509(b)(1) should contain a provision similar to that in Section 307(b)(1) of the Clean Air Act stating that if the Agency action is based on a determination of nationwide scope or effect, and if in taking the action the Administrator finds and publishes that the action is based on such a determination, review of the action must be in the District of Columbia Circuit.

- Amend §509, parallel to §307(d)(7)(B) of the Clean Air Act, to provide that only an objection to a rulemaking action of the Administrator that was raised with reasonable specificity during the comment period may be raised for judicial review; that if it was impractical to raise such an objection during the public comment period or if the grounds for such an objection arose after the close of the public comment period and the objection is of central relevance to the outcome of the rulemaking action, the Administrator shall convene a proceeding for reconsideration of the rulemaking action and provide the same procedural rights as would have been afforded had the information been available at the time the action was proposed; and that if the Administrator refuses to convene such a proceeding, the person raising the objection may seek review of her refusal in the U.S. Court of Appeals. Reconsideration by the Administrator would not postpone effectiveness of the rulemaking action, but the effectiveness of the action amy be stayed by the Administrator or a court for a period not to exceed three months.

- Amend §509, parallel to §307(d)(8) of the Clean Air Act, to provide that the sole forum for challenging procedural determinations made by the Administrator shall be in the appropriate U.S. Court of Appeals at the time of substantive review of the action; that no interlocutory appeals shall be permitted with respect to such procedural determinations; and, that the Court may invalidate an action on the ground of alleged procedural errors only if the errors were so serious and related to matters of such central relevance to the action that there is a substantial likelihood that the action would have been significantly changed if such errors had not been made.

- Amend §309(g)(2)(A) and (B) to make uniform the event and time period by which penalties are assessed by requiring penalties to be assessed "per day for each violation."

- Amend §309(c), (d), and (g) to delete provisions related to "single operational upset" because they are confusing and needlessly complicate enforcement efforts.

- Provide in CWA §313 that the United States, its agencies and officers have the right to remove actions brought in State court to Federal court.

- Provide that Federal agencies subject to administrative enforcement actions may be represented by counsel admitted to any bar of a Federal court or of the highest court of any State or Territory.

- Amend CWA §402 to require that a violator, upon a finding of liability, provide notice to the public that it has been found in violation of the CWA. Such notice might be provided through publication in a local newspaper.

- Amend CWA §505(a)(2) to permit citizens to bring action against the Secretary of the Army for failures to perform nondiscretionary duties.

- Amend section 312 to prohibit expressly the discharge of sewage from any vessel subject to the standards and regulations of that section unless the vessel is equipped with an operable marine sanitation device, and such device is used in compliance with the Act. EPA and the Coast Guard should be empowered to enact regulations for assuring compliance with this requirement, such as regular certification of the installation and proper use of the device. EPA and the Coast Guard should also be jointly empowered to enforce this requirement. Violations of this prohibition should be subject to administrative, civil judicial and criminal penalties under section 309, as well as injunctive relief.

- Section 309 should be amended to clarify that the Shipowner's Limitation of Liability Act, 46 U.S. C. 103 et seq., does not limit liability for civil penalties

and injunctive relief. Section 311 should be amended similarly to clarify that the Shipowner's Limitation of Liability Act does not limit liability for the costs of removal of oil or a hazardous substance or for restoration or replacement of natural resources. The United States has been forced to litigate whether defendants' liability under the Act is limited by the Shipowner's Limitation of Liability Act, and a clarifying amendment of Section 309 would avoid onerous litigation over this issue.

CHAPTER 6--PERMITTING

PERMITTING IN BRIEF

The National Pollutant Discharge Elimination System (NPDES) Program is one of the centerpieces of the CWA's water pollution programs. Under NPDES, "point source" discharges of pollutants into waters of the United States are prohibited unless authorized through a permit. NPDES permits contain technology-based and water quality-based pollutant limits as well as monitoring and reporting provisions, and are the fundamental mechanism for enforcing effluent limitations and water quality standards of the Act. The NPDES program through permits currently regulates hundreds of thousands of dischargers. The NPDES program is enhanced by the pretreatment program, which regulates industries that discharge pollutants into municipal sewerage systems, and the sewage sludge program, which regulates the use or disposal of sewage sludge.

Although one of the oldest programs implementing the CWA, the NPDES program continues to evolve to reflect experience with implementation and advances in the policy and science of water pollution control. Accordingly, EPA's permit program recommendations in the context of CWA reauthorization balance the need to maintain and improve traditional programs (e.g., pretreatment), meet the demands of new program development (e.g., storm water, CSO), and accommodate new paradigms for control of toxic pollutants (pollution prevention, innovative technology).

Pollution prevention and technology innovation. In the last decade, pollution prevention has received increased attention. Although the CWA has not yet explicitly endorsed pollution prevention or innovative technology approaches (with the exception of an innovative technology waiver provision which was not widely used), it does create sufficient flexibility to explore such approaches. The Administration recommends amendments to the CWA that include pollution prevention planning (and best management practices where appropriate) as enforceable NPDES and pretreatment program components, and supports incentives to promote innovative technology.

Storm Water. Under section 402(p) of the 1987 Amendments, EPA has established a two-phased program to address the discharge of contaminated storm water. This has increased dramatically the size and scope of NPDES coverage.

Under Phase I, EPA has established storm water permitting requirements for industrial activities and for municipal separate storm sewer systems serving over 100,000 people. Phase II applies to facilities and systems not covered under Phase I; Phase II sources are required to obtain a permit by October 1, 1994. Phase II may cover ten times as many facilities as Phase I. Based on EPA's experience with Phase I, and on the likely broader scope of Phase II, the Administration recommends amendments to

the CWA that would provide a more gradual shift to water quality-based municipal storm-water permitting, exempt facilities with no storm water exposure from storm water program requirements, extend Phase II deadlines, and control remaining non-municipal sources through municipal storm water management programs.

Combined sewer overflows (CSOs). Nationwide, about 1,100 communities have combined sewer systems that discharge raw sewage, industrial wastes, and storm water from nearly 15,000 CSOs. EPA's 1993 draft CSO Policy, developed through negotiations with State, environmental, and municipal representatives, contains significant new permitting and enforcement provisions that will foster development of NPDES permit requirements, elimination of dry-weather overflows, and timely compliance.

Pretreatment. Under the authority of EPA or State-approved local pretreatment programs, some 1,500 POTWs now regulate over 30,000 significant industrial users and hundreds of thousands of other non-domestic dischargers through permits or other individual control mechanisms. Effluent and sewage sludge quality have improved markedly as a result.

The Administration is recommending minor revisions to CWA pretreatment requirements to improve control over non-domestic discharges to sanitary sewers. Removal credits should only be allowed for pollutants that actually biodegrade in POTW treatment systems rather than those that transfer to sludge or the atmosphere. Additionally, the Administration supports minor modifications to the Domestic Sewage Exclusion (DSE) and requests statutory authority for EPA to directly regulate industrial users.

POLLUTION PREVENTION IN NPDES PROGRAM

ISSUE:

How should CWA be amended to incorporate pollution prevention requirements that would facilitate reduction in pollutant loadings from industrial facilities?

BACKGROUND:

Pollution prevention is a high priority of EPA. However, it has been difficult to uniformly promote pollution prevention in existing programs where authority to require pollution prevention is not expressly authorized.

There are, however, examples of pollution prevention activities already underway in the NPDES program. Twenty States have passed facility planning legislation. These laws typically require certain types of facilities to assess their production processes, identify opportunities for source reduction or toxic use reduction, set quantifiable goals, and establish a plan for meeting these goals. In addition, many POTWS are beginning to require source identification and pollution prevention assessment studies. BMPs to promote pollution prevention are also used in NPDES permits, including EPA's storm water general permits for industrial activities. Further, the recently-proposed Water Quality Guidance for the Great Lakes System includes a program requirement that requires, as a condition in permits, the permittee to develop and conduct a pollutant minimization program when a water quality-based effluent limitation (WQBEL) for a pollutant is determined to be less than the level of detection.

The Administration believes that the CWA should be amended to further incorporate pollution prevention in the NPDES program. Authorizing EPA to require facilities to conduct pollution prevention opportunity assessments, often called pollution prevention plans, would allow EPA to require certain facilities to identify and evaluate cost-effective opportunities to reduce pollution at the source of its generation on a whole-facility, multi-media basis. This authority would be particularly useful when the Agency issues water quality-based effluent limitations that are below the level of detection for the specific parameter, when water quality standards are not being met in the receiving water, and when a facility's choice of treatment results in media-transfer of pollution instead of treatment. This authority would provide permit writers access to information on potential source reduction techniques to determine appropriate permit requirements. Pollution prevention assessments could be used also to help them identify a cost-effective pollution reduction strategy to meet technology-based or water quality-based limitations.

In addition, the CWA could be amended to promote pollution prevention by clarifying EPA's authority to require BMPs for point sources in NPDES permits. Although EPA

interprets §301 to authorize the imposition of point source BMPs whenever necessary to achieve statutory controls, others have argued that §304(e) limits such authority.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

- Provide permitting authorities the discretionary authority to require pollution planning as a NPDES permit and industrial user (IU) condition. Facilities may be required by permitting authorities to submit a multi-media pollution prevention evaluation as a condition of NPDES permits or permit applications, or pretreatment standards. In exercising this discretionary authority, permitting authorities would consider the need for the information, the burden of developing and implementing a plan, and the environmental and public health risk of the pollutants being addressed. For example, plans could evaluate the effluent mitigation performance of a facility when the effluent limitations are below the level of detection. Existing facility pollution prevention programs and relevant evaluations will be considered in fulfilling such requirements. Before requiring implementation of any pollution prevention activity, the authority should evaluate the relative cost-effectiveness of alternative pollution control requirements.

- Clarify NPDES permit authority to impose BMPs for point sources through NPDES permits to ensure compliance with the goals of the CWA. Such authority should not be limited by the provisions in §304(e). In addition, such authority should also specifically address discharges from process lines and operating practices, such as facility maintenance and cleaning. Such authority is not intended to include BMPs for nonpoint sources.

INNOVATIVE TECHNOLOGY INCENTIVES

ISSUE:

Should the CWA be amended to provide specific incentives to private industrial development and research of new, innovative technologies?

BACKGROUND:

A. Industrial Technology Development

The structure of the NPDES program has been cited as constricting experimentation on new, innovative technologies. Permit effluent limitations are generally based on the known performance of tried technologies. Though not restricted by the NPDES program, industry has argued that process and treatment changes to save money, time, or energy, or to reduce pollutant discharge are not encouraged under the existing program.

Implementation of pollution prevention or energy-saving measures at specific facilities often involves extensive technological adaptation or use of techniques or materials previously untried in similar applications. Facilities undertaking process changes or innovative treatment technologies may be uncertain of the environmental outcomes those modifications will produce. Despite current Agency enforcement policy which does already allow for reduced penalties for expenditures for a failed technology that could reasonably have been expected to work, fear of CWA noncompliance during and after experimentation may hinder efforts to innovate if projected savings are not sufficient.

Environmental statutes have provided for innovative technology incentives; however, these have not fostered widespread development of innovative approaches by the regulated community. Section 3005(g) of RCRA provides for research, development and demonstration (RD&D) permits for hazardous waste treatment technologies. This program has not been widely used, in part, because RD&D permits had low priority in EPA regional offices and, in part, because of continuing liability. Section 301(k) of CWA allows for a permit compliance schedule; this waiver provision has been under-used by industry in part because the provision expired shortly after the statutory date for compliance with pretreatment standards and in part because the waiver provision was too unstructured to provide comfort for the industry, EPA, or environmental groups. CWA §307(e) also provides a similar extension for IUs which is still applicable for new or revised categorical standards.

Many facilities are capable of testing new technologies without major impacts on effluent quality by using pilot-scale facilities, bringing on-line temporary treatment units to "pre-treat" effluents from experimental production lines, or by adjusting

existing treatment facility operating parameters such as detention time, aeration, or pH. Effluent quality may be impacted for brief periods while adjustments are made.

B. Marine Pollution Prevention & Control Technology Development

Because incidental discharges from vessels engaged in transportation, by regulation, are not required to be permitted under NPDES, relatively little regulatory attention has been paid to non-sewage discharges from vessels. With few exceptions, there are no national technology-based standards for non-sewage discharges from vessels; therefore, uncertainty exists regarding effluent requirements for these discharges, impeding long-term research and development of vessel pollution control technology and the free movement of Department of Defense (DOD) vessels. DOD is prepared to partner with EPA and affected States to develop uniform national standards for incidental discharges from DOD ships. Environmental (e.g., protection of sensitive areas), technological, operational, and cost criteria, as well as international standards, would be considered in developing the standards. To ensure the stability necessary for long-term research, development, procurement and installation, the uniform national standards would govern vessel discharges, but the of States to establish no-discharge zones, under appropriate circumstances, would be preserved. The standards would result in the development of advanced, dual-use technology which could then be made available to other vessels or applications. The Secretary of Transportation may designate Department of Transportation vessels equivalent to DOD vessels to be subject to such uniform national standards.

RECOMMENDATIONS:

A. Industrial Technology Development

The Agency should be authorized to grant short-term schedules to allow temporary waivers from technology-based limits (not to exceed water quality-based limits) to encourage experimentation with process changes to reduce source contributions of pollution, reduce wastewater flow, or reduce energy-consumption. This would also protect facilities from the threat of citizen suits as long as they comply with the terms of the schedule and interim limitations.

Specifically, the CWA should allow the Agency to:

- Grant temporary waivers from applicable technology-based limitations (BPT, BAT, BCT, NSPS, PSES, PSNS) (not to exceed three years from the date for compliance with such effluent limitation which would otherwise be applicable) to industrial facilities in exchange for environmental enhancement at the end of the waiver period in the form of satisfying predefined minimum effluent reductions that are more stringent than the applicable technology-based limitations or, alternatively, meeting the applicable technology-based limitations

in conjunction with enforceable conditions for satisfying a predefined minimum reduction of total emissions to all other media, a predefined minimum reduction in energy consumption, or an overall decrease in the cost of treatment.

- Require industrial facilities granted a short-term waiver meet the more stringent of water quality-based effluent limitations (local limits in the case of industrial users of POTWs) or previously effective BAT (PSES in the case of industrial users of POTWs), whichever is more stringent, during the period of the waiver.

B. Marine Pollution Prevention & Control Technology Development

Amend CWA Section 312 to:

- Mandate review of non-sewage discharges incidental to the normal operation of DOD vessels and other vessels designated by the Secretary of Transportation as equivalent to DOD vessels. Determine whether regulation of such discharges through the application of technology is appropriate, and if so, establish and periodically review uniform national standards.

- Involve the States, federal agencies and other interested parties in the development of standards, which would be enforceable by federal and State authorities.

- Upon the effective date of such regulations, preclude development of vessel discharge standards inconsistent with the national standards. Preserve the right of States to establish no-discharge zones, under appropriate circumstances, such as to protect environmentally sensitive areas.

STORM WATER PROGRAMS

ISSUE:

How should CWA storm water requirements be revised to strengthen and facilitate implementation of storm water controls?

BACKGROUND:

States report that approximately 30 percent of remaining surface water quality impairment is attributable to storm water discharges. Significant sources of storm water discharges include urban runoff, industrial activity, construction, and resource extraction (mining). For example, in urban areas, loadings from storm water runoff for heavy metals, sediment, bacteria, polycyclic aromatic hydrocarbons (PAHs), acidity, and floatables are higher than those from POTWs.

To address these environmental risks, Congress established in 1987 a two-phased storm water program under CWA §402(p). Phase I applies to municipal storm sewer systems serving a population over 100,000, as well as storm water discharges associated with industrial activity.

In November of 1990, EPA issued regulations that identified 220 municipalities whose separate storm sewer systems are subject to Phase I of the NPDES program. States and EPA have designated an additional 550 municipalities as part of the Phase I program. The Agency estimates that the Phase I municipalities have a population of over 90 million people (about 36 percent of the total U.S. population). EPA and authorized States have received comprehensive permit applications from many of the municipalities, and are in the process of developing and issuing permits for these dischargers.

In addition, the Phase I regulations established regulation of over 100,000 industrial facilities in eleven categories, including manufacturing, mining, waste management, construction, and transportation. Permits for storm water discharges from Phase I industries generally were required to be issued by October 1, 1993. The Ninth Circuit struck down EPA's exemption from Phase I regulations of construction sites under 5 acres and light industrial activities "with no exposure" to rain water.

Phase II applies to all remaining light industrial, commercial, retail, and residential facilities with storm water discharges that are not in Phase I. Preliminary estimates indicate that millions of facilities are not addressed by Phase I. Phase II is potentially ten times larger in scope than Phase I, and could address a large number of municipalities without significant urban populations. EPA was required to issue Phase II regulations by October 1, 1993, which would designate classes of Phase II storm water discharges to be regulated to protect water quality. Phase II sources are

required to obtain a permit by October 1, 1994. EPA did not meet the October 1993 deadline for Phase II regulations.

Municipal Compliance with Standards

Municipal separate storm sewer systems (or "MS4"--those municipal systems that are covered by the storm water program) have stated that it is both technologically and financially impossible to establish treatment or management practices that can ensure that urban storm water runoff complies with water quality standards. They have indicated that it is highly uncertain whether feasible storm water control measures (source controls, traditional structural controls, and best management practices) will ensure that storm water discharges will meet water quality standards. They further argue that the only other alternative, collecting and treating essentially all of the storm water from widespread urbanized areas, would be infeasible and result in significant destruction of urban streams and wetlands.

Under the existing CWA, §402(p)(3)(B)(iii), a statutory standard exists that NPDES storm water discharge permits issued to municipal separate storm sewer systems require controls to reduce the discharge of pollutants in storm water to the "maximum extent practicable" (MEP). The statutory standard can include management practices, control techniques, and system design and engineering methods and other such provisions that the Administrator or State determines are necessary for the control of such pollutants. Because of the lack of a more specific definition of the statutory standard of MEP, municipalities, permitting authorities, and members of the public are uncertain as to the extent of storm water control requirements a municipality must implement in its storm water management program.

Provisions for Facilities with No Exposure

EPA attempted to exempt from storm water control requirements certain industrial facilities that had no exposure of materials, equipment, or wastes to storm water. However, this exemption of facilities without storm water exposure was overturned by the Ninth Circuit. Such an exemption, if reinstated through legislation, would create a strong incentive for facilities to implement pollution prevention. It would simultaneously accomplish environmental objectives (reducing pollutants in storm water) and greatly reduce administrative burdens for EPA, States, and industries.

Deadline Extensions for Phase II

EPA is presently required to issue Phase II regulations designating sources for permitting and establishing deadlines by October 1, 1993. In the absence of new regulations, Phase II sources are required to have permits after October 1, 1994. Given the scope and complexity of Phase II, EPA was unable to meet the October 1, 1993 regulatory deadline. Furthermore, EPA and authorized States will not be able

to issue permits to all Phase II sources by October 1, 1994. This may expose unpermitted dischargers, including many small municipalities or commercial enterprises posing small risks, to litigation for discharging without a permit. In addition, potential Phase II municipalities need additional time to develop the financial capabilities and institutional frameworks needed to comply with storm water requirements.

Phase II Storm Water Requirements

Phase II regulations must be reasonable in scope and establish a workable program that will focus on sources of storm water discharges that pose the highest risk. The Bureau of Census has designated 396 urbanized areas which represent the most widespread and dense urban development. These urbanized areas occupy less than 2 percent of the total land area of the United States but contain 165 million people, or about 65 percent of the total population of the United States. In addition, most new development occurs in or adjacent to these urbanized areas. Between 1980 and 1990, over 75 percent of the national increase in population occurred in these urbanized areas. However, over 5,000 municipal entities in urbanized areas are not in Phase I of the NPDES storm water program.

Authorize Municipalities to Directly Regulate Storm Water Facilities Within Their Jurisdiction

Under current CWA provisions, the storm water program requires permits for industrial activities even if they are discharging to municipal separate storm sewer systems which also must obtain storm water permits. Municipalities argue that this is redundant and inefficient, and also undercuts their effectiveness in directly dealing with an industrial facility.

Inactive and Abandoned Mines

It is estimated that there are in the range of 400,000 or more inactive and abandoned mine sites (IAMs) on Federal lands. The environmental damages posed by these sites can vary significantly. While many sites are relatively benign, releases from other sites result in significant environmental degradation, even decades after active operations have ceased. A major administrative challenge is to (1) prioritize these sites that cause environmental problems so that the United States can address them in a rational environmentally protective manner, and (2) effectively protect water resource quality by addressing these sites according to the prioritized order. Another major challenge is to target control measures so as to achieve the greatest improvement in environmental quality for the limited Federal resources that may be available. Although the estimates of total costs of mitigating water resource quality impacts from IAMs vary significantly, they range into the many tens of billions of dollars without such cost-effective, risk-based prioritization.

A significant number of IAMs on Federal lands are believed to have point source discharges of pollutants, as defined under current statute and regulation, to waters of the United States subject to regulation under the NPDES permit program. Given the large number of IAMs and the costs of mitigating sites causing environmental impacts, there is a need for a phased, cost-effective, risk-based prioritized approach to mitigating these sources.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended to do the following--

Municipal Compliance with Standards

- Establish a phased permit compliance approach that requires best management practices in first-round municipal storm water permits, and through improved best management practices in second-round permits, where necessary, to move towards compliance with water quality standards. In later permits, compliance with water quality standards will occur using water quality based effluent limits, where necessary. This would give EPA and municipalities additional time to evaluate the technical feasibility of establishing numeric effluent limits to meet water quality standards and give States time to develop specific water quality standards appropriate for storm water discharges, if necessary.

- The Administration supports clarifying authority under section 402(p)(3)(B) concerning "maximum extent practicable" (MEP). In contrast to best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) that are applicable for storm water discharges associated with industrial activities, under MEP, storm water management programs can be implemented in a site-specific and flexible manner to address the storm water management concerns in the municipality. It should be made clear that MEP allows for the consideration of different factors including: (1) the severity of the impairment caused by the source, (2) the effectiveness of alternative approaches at reducing storm water discharges, and (3) the cost of control measures. Under MEP, a storm water management program can target controls based on differences in the type and size of sources, climate, geography, and water quality concerns. Based on a statutory clarification, EPA will then issue guidance on the best methods by which to implement MEP in NPDES permits.

- The Administration supports encouraging States to review and revise their designated uses and water quality standards implementation procedures, as they develop water quality-based permits, to reflect the episodic nature of storm water runoff, the varying loadings during storm water events, and the

potential resilience of natural ecosystems to some infrequent, temporary incremental loadings.

Provisions for Facilities with No Exposure

- Authorize EPA to exempt from individual storm water permitting requirements facilities that can certify that there is no nor will be exposure of industrial or other activities or significant materials to rain water and snow melt. This change would ensure that several hundred thousand low-risk facilities are not subject to NPDES requirements, allowing allocation of resources to more critical areas. This would also effectively create incentives for facilities to eliminate contamination of storm water.

Deadline Extensions for Phase II

- Extend the Phase II deadline for EPA issue to regulations to October 1, 1997. Also, extend the deadline to obtain a permit to October 1, 1999. These extensions are necessary to allow EPA to work with States and municipalities in developing workable, effective regulations. Extending the deadline for permits would give municipalities an opportunity to begin to build institutional frameworks and provide the funding necessary to implement storm water management programs. It would also allow permits to be issued to Phase II municipalities at the same time Phase I permits are expiring. This will promote regional and watershed-wide permitting by allowing different municipalities to be co-applicants and coordinate their storm water programs.

Phase II Storm Water Requirements

- Focus Phase II requirements on system-wide permits for municipal separate storm sewer systems in Census-designated urbanized areas with a population of 50,000 or more.

- Target storm water management programs for municipal separate storm water systems (MS4) in the 138 Phase II urbanized areas associated with a Phase I permitted MS4 to address, at a minimum, non-storm water discharges into storm sewers and storm water runoff from growth and development and significant redevelopment. The CWA should encourage NPDES permitting authorities as part of a watershed approach to implement a more comprehensive municipal storm water management program where appropriate based on water quality impairments or other factors for the MS4s in these urbanized areas. In the remaining 258 Phase II urbanized areas, storm water management programs would be required which focus only on controlling non-storm water discharges into storm sewers and storm water runoff from growth and development and significant redevelopment activities.

- Under Phase II for those MS4s required to implement a storm water management program targeted to growth, development and significant redevelopment and illicit connections, the municipal program will control those Phase II storm water sources, including discharges from construction of less than 5 acres, which are part of growth, development, and significant redevelopment activities and may address, where appropriate, subject to the MEP standard, those Phase II sources causing water quality impairment. For those municipal separate storm sewer systems required by the NPDES permitting authority to implement a more comprehensive storm water management program, Phase II light industrial, commercial, retail, and institutional storm water sources would be addressed through the program under the municipality's NPDES storm water permit, which meets the MEP standard. Phase II sources not addressed through a municipal program would not be covered by the NDPES program.

- Do not directly regulate Phase II light industrial, commercial, retail, and institutional storm water discharges, and municipalities outside of Census-designated urbanized areas under the NPDES program, unless otherwise designated by the permitting authority for inclusion in the NPDES program under §402(p)(2)(E) of the CWA. (EPA does not expect that this designation process would be used, except in highly-unusual circumstances, to require an NPDES permit for a typical homeowner.) Rather, such discharges could be addressed by NPS program, if they were a targeted source.

Authorize Municipalities to Directly Phase I Industrial Regulate Storm Water Facilities Within Their Jurisdiction Under the NPDES Program

- Allow EPA and authorized States to authorize municipalities to establish programs for Phase I industrial storm water permit issuance and controls, where it has the appropriate authority, and is willing to commit to implement Federal requirements. EPA does not envision Federal funding to be available to municipalities to perform this function. This recommendation is similar to the industrial pretreatment program currently authorized under the CWA. As in the industrial pretreatment program, storm water permits and controls that are issued by municipalities in an EPA-approved program would be Federally enforceable.

Inactive and Abandoned Mines

- The Administration recommends that the CWA be amended to make the following changes to the NPDES permitting program to target control measures so as to achieve the greatest improvement in environmental quality for the limited Federal resources available for inactive and abandoned mine sites (IAMs) without an operator present:

- The Administration supports clarifying authority to issue NPDES permits on a State-wide basis for IAMs within resource management units (e.g., one permit per State for the National Forest Service, National Park System, Bureau of Land Management, or Fish and Wildlife Service resource areas). This would allow Federal land managers to establish State-wide priorities based on impairment or threats to water resource quality and the most effective use of the available resources. Such priorities could allow some sites not to be controlled or be subject to relatively less stringent controls.

- The Administration supports an amendment to substitute, for existing technology-based requirements under the NPDES program for IAMs on Federal lands, the authority for Federal land managers to identify water resource quality that is threatened or impaired by IAMs and to implement targeted controls for such sites, similar to existing authority for permits for municipal separate storm sewer systems contained in section 402(p)(3)(B).

- The Administration further supports allowing, in general, no more than up to ten years to meet appropriate water quality standards within a resource management unit, as defined in the language above, from the date of issuance of an NPDES permit to the Federal land manager. The Federal land manager would be expected during this period to 1) strive to achieve water quality standards as expeditiously as possible, 2) continue to assess the water resource quality impacts of IAMs where they are currently unknown, and 3) continue to implement targeted controls for those sites causing impairments or threats once identified. This provision should not apply to IAMs which were permitted under the NPDES program prior to the date of enactment.

- The Administration supports encouraging States to review and revise their designated uses and water quality standards implementation procedures, as they develop water quality-based permits, to reflect the episodic nature of storm water runoff, the varying loadings during storm water events, and the potential resilience of natural ecosystems to some infrequent, temporary incremental loadings.

COMBINED SEWER OVERFLOWS (CSOs)

ISSUE:

Should requirements for CSOs be specifically authorized in the CWA?

BACKGROUND:

As many as 1100 cities (almost 85 percent of which are located in the Northeast and Great Lakes areas) serving a population of 43,000,000, have combined sewer systems that overflow and result in the discharge of raw sewage, commercial and industrial wastes and storm water to waters of the U.S. during wet weather events. State water quality assessments have shown CSOs to be responsible for water quality impairments, beach closures, fish kills and shellfish bed closures. The 1992 Needs Survey Report estimates costs to properly control discharges from CSOs to be $41.7 billion.

In 1989, EPA took initial steps to address the CSO problem by issuing a CSO strategy calling for positive actions toward abating CSOs and achieving water quality standards. EPA has circulated a draft "Combined Sewer Overflow Control Policy" (January 1993) that comprehensively expands the 1989 CSO policy and will drive future actions. This draft policy was developed through negotiations with State, environmental, and municipal representatives. Public comment on the draft has been highly supportive. The draft policy contains provisions for developing appropriate, site-specific NPDES permit requirements for all combined sewer systems that overflow as a result of wet weather. The draft policy also announces an enforcement initiative to require immediate elimination of overflows that occur during dry weather.

RECOMMENDATION:

- The Administration recommends that Congress in the 1994 amendments to the CWA endorse the new CSO Policy and its principles. The CSO Policy ensures that municipalities, permitting authorities, water quality standard authorities, and the public engage in a comprehensive and coordinated planning effort to achieve cost effective CSO controls that ultimately meet the appropriate health and environmental objectives. The key principles are: (1) providing clear targets of control that would be "presumed" to meet water quality standards; (2) providing sufficient flexibility to municipalities, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and the incremental pollution reduction achieved and incremental cost of a range of control options in developing long-term plans; (3) allowing financial capability; and, (4) review and revise, as necessary, water quality standards and their implementation procedures when developing CSO control plans to reflect the episodic nature of overflow events and local ecosystem conditions.

The EPA Administrator will develop further guidance on the implementation of the CSO policy that recognizes and properly reflects these principles and encourages innovative approaches for achieving the objectives of the policy.

PRETREATMENT

ISSUE:

How should CWA pretreatment requirements be revised to strengthen and facilitate implementation of controls on indirect discharges to POTWs?

BACKGROUND:

The National Pretreatment Program is a joint regulatory effort by EPA, States, and municipalities to ensure that non-domestic discharges of pollutants to publicly owned treatment works (POTWs) do not interfere with POTW operations, pass through to receiving waters, or contaminate sewage sludge. The pretreatment program has evolved considerably over the past twenty years, and now extends to more than 200,000 non-domestic sources (including 30,000 significant industrial users). The program is implemented primarily at the local level, where approved local pretreatment programs at over 1,5000 POTWs address nearly 80 percent of the nation's municipal wastewater flow annually.

Experience with the pretreatment program leads the Administration to recommend statutory changes to provide authority to allow EPA to issue control mechanisms to industrial users, and modify the scope of the Domestic Sewage Exclusion (DSE) within the CWA.

Permitting Indirect Users

EPA does not have the authority to issue discharge permits to IUs of POTWs even where EPA must act as the pretreatment control authority (i.e., where there is no approved State or local pretreatment program), or where the control authority fails to issue a control mechanism in a timely manner. The lack of such permitting authority for EPA results in complicated enforcement of pretreatment requirements. In addition, this may also result in disparate regulation of similarly situated industries.

Domestic Sewage Exclusion

Wastes that would otherwise be regulated as hazardous wastes under RCRA are regulated solely under the CWA (and not RCRA) if discharged to POTW collection systems. There is some concern that such wastes are not adequately regulated under existing CWA pretreatment authorities. The Administration, however, opposes repealing the DSE because it believes that existing pretreatment authorities generally are adequate to control discharges of RCRA hazardous wastes to POTWs. The Administration does, however, recommend narrowing the applicability of the DSE under the CWA.

RECOMMENDATIONS:

- EPA should be authorized to issue permits to those IUs for which EPA is the control authority. EPA should also be authorized to enforce all IU permits through administrative and judicial (both civil and criminal) procedures.

- EPA/State should be authorized to develop local limits if there is no local control authority.

- The Administration proposes to amend the CWA to prohibit discharges of material in domestic sewage that otherwise would be considered hazardous waste under RCRA into a POTW unless:

  - o the source is subject to and in compliance with an applicable categorical standard, or is subject to a general pretreatment standard established to regulate waste having the hazardous characteristics of the waste discharged;

  - o the wastestream and source are scheduled under CWA §304(m) to be regulated within five years to a new or revised pretreatment standard;

  - o the waste is introduced in de minimis amounts (by households, non-commercial entities, non-commercial entities, government office buildings, or similar sources only);

  - o the pollutant and source are in compliance with a local limit regulating the hazardous constituents or that is a reliable indicator for the hazardous constituents;

  - o the pollutant and source are in compliance with a technology-based local limit established by the pretreatment approval authority (for sources discharging to non-pretreatment POTWs only); or

  - o the wastestream and source will be subject in accordance with a statutory schedule, to a Toxic Reduction Action Plan, as defined by the statute, developed by the POTW to reduce discharges of hazardous wastes and toxic pollutants.

  The proposed revisions to the DSE would also require each pretreatment POTW to develop a Toxicity Reduction Action Plan (TRAP) for commercial users that are not subject to (or scheduled to be subject to) categorical standards. TRAPs would reduce hazardous waste and toxic pollutant discharges to POTWs through means such as public education, best management practices, and

technology-based local limits. EPA would provide guidance on the development and implementation of such plans.

CHAPTER 7--MONITORING

Water quality monitoring of physical, chemical, and biological conditions is essential for setting strategic planning goals, describing water quality status and trends, detecting water quality problems, helping design protection, restoration, and remediation programs, and measuring environmental results. Monitoring and data management programs cover many activities, including: data collection; data analysis; information storage and retrieval; and evaluation and reporting. Many Federal, State, Tribal, local, private, and volunteer agencies and groups monitor water quality. Monitoring is required by the CWA, other statutes, and agency programs.

The Administration proposes to strengthen the CWA by working with the States to outline minimum monitoring requirements for State programs under CWA authorities. Stronger State monitoring programs will help to focus CWA programs on waters that need management attention. More comparable State monitoring programs will generate compatible information to aggregate into a nationwide water quality assessment. Stronger State monitoring programs also will help State and Federal agencies do a better job of determining whether our environmental management programs are achieving the environmental results that we seek.

The Administration also proposes an improved inventory and reporting system. Every five years, States would take inventory of their impaired, threatened, and high quality waters that need special protection. The States would provide a list of such waters to EPA for approval. The inventories would complement reports submitted on the overall condition of water quality throughout the States, as already required under Section 305(b). In addition to information from the inventories, the State 305(b) reports and EPA's aggregation of them in its report to Congress would draw upon the scientific information gathered by many other programs. These comprehensive inventories and reports would provide an excellent basis for establishing national priorities for pollution prevention, restoration, and management programs and for applying Federal, State, and local resources and control requirements in the most cost effective manner.

The Administration is committed to compatible and well-coordinated water quality monitoring programs. Major Federal, State, and other public and private monitoring agencies are working together on the Intergovernmental Task Force on Water Quality Monitoring (ITFM). The ITFM has already proposed a national strategy for water quality monitoring that addresses the institutional framework to conduct monitoring; environmental indicators to measure progress toward national goals; comparable data collection methods and data management systems; and national reporting of water quality conditions. The Administration strongly supports this successful Task Force.

STRENGTHENING STATE AND TRIBAL PROGRAMS

ISSUE:

What is the best way to strengthen State and Tribal water quality monitoring programs?

BACKGROUND:

State and Tribal water quality monitoring programs generate important data and information necessary to guide water quality management decisions and track environmental progress. Water quality monitoring programs support States and Tribes as they implement their own water management programs and the many CWA programs delegated to them by EPA. Stronger State monitoring and data management programs will help to better target the waterbodies that need the most attention for clean up, better protect areas that already meet water quality standards, and begin to assess waters about whose health little is known. Stronger State water quality monitoring programs also will help the States, EPA, and other Federal agencies do a better job of determining the extent to which management and control programs are achieving the environmental results that we seek.

Greater comparability is needed among State water monitoring programs and among the analytical methods that all water quality monitoring programs depend upon. The current lack of comparability hinders the usefulness of data and prevents aggregation of information on a National basis. Furthermore, more efficient and better coordinated and targeted monitoring programs will more fully support integrated watershed management, including the development of appropriate goals and indicators as well as the measurement of success.

Currently, section 305(b) requires States to submit reports to EPA every two years, however, there are not sufficient resources to carry out comprehensive State-wide assessments on this time frame. Consequently, 305(b) reports can only provide information on a portion of the Nation's waterbodies. If the period between reports were extended from two to five years, States could gather and analyze sufficient data to provide a more comprehensive "snapshot" of the condition of their waterbodies.

RECOMMENDATIONS:

- The Administration proposes that the CWA should direct EPA to work closely with States and other Federal agencies to establish effective minimum monitoring and reporting requirements. Such State monitoring requirements should be established as part of a coordinated national monitoring strategy and include appropriate incentives to ensure compliance.

- In addition, the CWA should also change the requirements for the 305(b) report from a two-year cycle to a five-year cycle, and specifically include water resource data from other Federal agencies. A longer reporting cycle would allow States to assess all their waterbodies over the reporting time period, and, if States and Federal agencies use comparable methods in their assessments, will enable the 305(b) report to be used to portray water quality trends. While States would submit a formal 305(b) report every five years, they should also submit to EPA, electronically if possible, annual updates of key information, such as strategically determined environmental indicators.

INVENTORY OF WATERS

ISSUE:

How should States identify impaired, threatened, and special protection waters (including wetlands) and establish priorities for water quality management activities?

BACKGROUND:

The CWA contains numerous requirements, some added in previous reauthorizations, to characterize water quality. The proliferation of these requirements has resulted in an array of lists, reports and schedules. For example, §305(b) requires States to report to Congress; §303(d) requires States to identify water quality limited waters and establish priorities for waters needing control measures through Total Maximum Daily Loads (TMDLs); §314(a) requires States to assess lakes as a prerequisite to receiving §314 grants; §319(a) requires States to identify waters that are not expected to meet standards without control of nonpoint sources; and, §304(l) requires States to identify problem waters according to 3 categories.

Each of these requirements was intended to fulfill a specific information or program need. However, as the water program matures and the protection and restoration of living aquatic resources is recognized as an overall goal along with protection of human health, single purpose, overlapping lists and reports become more and more ineffectual. This decline in utility is reflected in redundant and overlapping program requirements and the associated waste of scarce State and EPA financial and personnel resources.

More importantly, a comprehensive inventory and listing of threatened, impaired, and special resource waters could provide an excellent tool for applying Federal, State, and local resources and control requirements in the most cost effective manner. This is needed because single purpose lists do not effectively support the targeting efforts that are needed to select the most important areas in which to dedicate scarce resources.

RECOMMENDATIONS:

- The Administration recommends that the CWA provide for a comprehensive State inventory of waters under a new section 305(c). This inventory would satisfy the requirements of other lists of waters required by the CWA. The comprehensive inventory of waters would provide one list of waterbodies and wetlands for each State to be used as a common basis for planning, management, and protection. For example, the inventory would be used to help write §305(b) reports; revise water quality standards under §303(a); identify waters requiring TMDLs under §303(d); determine site management

measures required under §319; establish permit issuance schedules under §402; and determine watersheds for which comprehensive watershed management plans would be developed and implemented under §321.

Each State inventory would build upon existing sources and readily available data and would contain: (1) a list of waters, including urban waters, wetlands and estuaries, for which existing pollution control requirements are not expected to be stringent enough to achieve applicable State water quality standards; (2) a list of waters, including urban waters, wetlands and estuaries, in which the achievement of State water quality standards is threatened by any pollutant, factor, or combination thereof; (3) a list of waters, including urban waters, wetlands and estuaries, that require protection of drinking water supplies, protection of endangered species or habitat supporting threatened or endangered species, or high quality waters, special protection waters, and special protection as outstanding natural resource waters or waterbodies (including priority ground waters that are directly hydrologically connected to surface waters) as the State or EPA may determine; (4) an identification of the categories and subcategories of sources causing or substantially contributing to the failure to meet applicable State water quality standards for each waterbody, including urban waters, wetlands and estuaries; and (5) a delineation of watersheds for all waters listed, including urban waters, wetlands and estuaries.

- Each State would need to provide for public review of their proposed State comprehensive inventory of waters prior to submission to EPA. EPA would review the inventory and within 90 days approve, conditionally approve, or disapprove the State inventory. In exercising this authority, EPA would seek input from federal natural resource trust agencies. In the absence of an acceptable State submission, EPA would prepare and publish a comprehensive State watershed inventory for a State.

  EPA would base approval or disapproval of State lists on relevant data from the States, other Federal agencies and other relevant sources, to ensure that all appropriate data are included in the inventory.

- Each State would be required to make the §305(c) lists widely and publicly available in communities across the State. Such lists should be in forms that are easily understood (e.g., maps) and may be placed where they are readily available to the public (e.g., public libraries).

- The schedule for the development of this inventory shall be consistent with the other requirements or guidance issued under this Act. The first inventory should be required within 2 years of enactment, and subsequent inventories every 5 years thereafter.

COORDINATION OF WATER MONITORING

ISSUE:

How should the water monitoring activities of Federal, Regional, State, and local agencies, Indian Tribes, and private organizations be coordinated to support the mandates of the CWA?

BACKGROUND:

Water monitoring activities include the collection, analysis, processing, interpretation, and reporting of water information. Many agencies collect information on surface water and ground water quantity and quality, sediment erosion, transport, and deposition, sediment quality, wetlands, aquatic communities, atmospheric deposition, and water use. While the CWA emphasizes water quality monitoring, other kinds of water and habitat information are essential for the interpretation and analysis of water quality conditions and trends and the identification of cause and effect relationships. For example, the computation of pollutant loads carried by rivers requires both water quality information and stream discharge information, and the assessment of aquatic habitat requires information about the geometry of the stream channel. Because water data collection responsibilities are dispersed among all levels of government, the identification and implementation of opportunities to make better use of available resources for water monitoring requires cooperation and coordination among many agencies and organizations.

Currently, State and Federal agencies and the private sector spend hundreds of millions of dollars to collect water quality monitoring information. These expenditures do not always yield information needed to support newer program directions such as watershed management and ecosystem protection. In particular, information is needed to evaluate the status and trends of ambient water quality at regional and national levels; to establish water quality standards; to evaluate the effectiveness and performance of water quality control programs; and to anticipate emerging problems.

The Office of Management and Budget (OMB), recognizing the need to improve the coordination of Federal water information programs and to develop effective working relationships with State and local agencies, Indian Tribes, and the private sector, established the Water Information Coordination Program (WICP) in December 1991 (OMB Memorandum No. M-92-01). Activities of the WICP are overseen by a sub-Cabinet level Steering Committee and carried out by a Federal Interagency Committee on Water Data, and a Federal advisory committee. Coordination also is maintained with the Federal Geographic Data Committee. In January 1992, the WICP established the Intergovernmental Task Force on Monitoring Water Quality (ITFM) to evaluate water quality monitoring activities in the U.S. and recommend improvements.

A report to OMB of the ITFM's first year's activities outlines a proposal to carry out a national strategy to enhance water quality activities and to support better management decisions. The strategy includes the establishment of a national council and regional entities to coordinate Federal and non-Federal water monitoring activities. ITFM task groups are addressing issues of data sharing and access, the use of environmental indicators to evaluate whether the water quality of a waterbody meets its designated use, the establishment of performance-based methods for data collection and analysis, and the development of recommendations for assessing and documenting the condition of water resources. The ITFM also has established several prototype field coordination efforts and proposes to initiate a Methods and Data Comparability Council to provide guidance on the development of performance-based data collection methods and protocols to enhance determination of data comparability. Representatives of Federal, Regional, State, and local agencies, Indian Tribes, and the private sector are involved with ITFM at the regional and State levels throughout the country to discuss the proposed strategy and to identify the next steps needed to improve the field coordination of monitoring activities.

Coordination of water monitoring activities is urgently needed to support water planning, management, and regulatory activities at all levels of government. The Administration has recognized this need and has put in place mechanisms to improve intergovernmental coordination. The CWA should recognize the need for improved coordination and enhance the ability of Federal, State, and other agencies to work together to achieve common monitoring goals. Existing mechanisms, especially the ITFM and the WICP are working well, and, the scope of ITFM may be easily modified to meet changing needs for coordination. For example, the scope of OMB Memorandum M-92-01 could be expanded to include marine waters to improve coordination between freshwater and saltwater monitoring activities.

RECOMMENDATION:

- The Administration recommends that the CWA should recognize the need for improved collaboration of water quality monitoring activities, and complement or enhance existing activities, not duplicate or supplant them. In particular, EPA and other Federal agencies should continue to use existing coordination mechanisms, such as the Intergovernmental Task Force on Water Quality Monitoring and the Water Information Coordination Program, to coordinate their water information activities and identify emerging areas of need.

RELATIONSHIP OF OTHER AGENCY RESEARCH AND MONITORING ACTIVITIES TO THE CLEAN WATER ACT

ISSUE:

The CWA should acknowledge and better coordinate the water quality research and monitoring activities conducted by all Federal agencies in support of their missions and Federal statutes.

BACKGROUND:

Many Federal agencies conduct water quality research and monitor water quality as part of their missions. These activities may be mandated by Federal statues, such as the Coastal Zone Management Act (NOAA), the Safe Drinking Water Act (EPA), the Marine Protection, Research, and Sanctuaries Act (NOAA), and the National Forest Management Act (Forest Service). They also may support land and natural resource management programs (National Park Service, Fish and Wildlife Service, Forest Service, NOAA, and Bureau of Land Management) or advance scientific understanding of hydrologic and environmental processes (USGS, Agricultural Research Service, Department of Energy, and NOAA).

These activities are conducted independently of the mandates of the CWA but can contribute much to the knowledge base and scientific understanding needed to administer the provisions of the Act. For example, USGS studies develop information on the quantity and quality of water resources with particular emphasis on hydrologic, hydrogeologic, and geochemical processes, many of which are undertaken in cooperation with State and local agencies. The USDA investigates the impacts of agriculture and forestry practices on water quality, and NOAA monitors coastal waters to assess the status and trends of environmental quality. The Army Corps of Engineers is studying wetlands restoration and hydrogeomorphic evaluation of wetlands functions.

The information produced by these and other programs can provide crucial information that can be used to support CWA goals. Attainment of these goals can be significantly enhanced by using the wide range of water quality related information generated by all agencies.

Because water quality research is carried out for purposes other than support of the CWA, it is appropriate that research should be coordinated by an existing interagency mechanism like the National Science and Technology Council (NSTC). NSTC will be a prominent forum for the exchange of information about agency research activities and for developing coordinated plans for future research.

RECOMMENDATIONS:

- The Administration proposes that language be added to the CWA to recognize and acknowledge the water quality research and monitoring undertaken to support statutes such as the Coastal Zone Management Act, the Marine Protection, Research, and Sanctuaries Act, the Safe Drinking Water Act, the National Forest Management Act, the Food Security Act, the Food, Agriculture, Conservation, and Trade Act, and many other related initiatives and programs.

- The Administration also recommends interagency coordination of existing and expanded monitoring under the National Coastal Monitoring Act, the Clean Water Act, the Marine Protection, Research, and Sanctuaries Act, and other statutes that provide the information needed to evaluate the effectiveness of Clean Water Act programs in protecting U.S. waters and associated resources.

- In addition, research activities authorized by the CWA should be coordinated with activities mandated by other environmental statutes using existing mechanisms, such as FCCSET.

CHAPTER 8--MISCELLANEOUS ISSUES

NATIONAL ESTUARY PROGRAM MANAGEMENT PLANS

ISSUE:

How should the National Estuary Program (§320) be strengthened so that EPA can provide funds to Management Conferences for overseeing and facilitating implementation of management plans?

BACKGROUND:

The National Estuary Program (NEP) was established under §320 of the CWA, as amended in 1987. Its mission is to identify nationally significant estuaries, protect and improve their water quality, and enhance their living resources. Through the NEP, EPA brings together key Federal, State and local organizations to comprehensively address problems in each estuary using a watershed protection approach. Each estuary project in the NEP is managed by a collaborative body called the Management Conference, which uses a consensus-building process to identify major environmental problems in the estuary and develop Comprehensive Conservation and Management Plans (CCMPs) for addressing them.

The NEP currently includes 21 programs: Casco Bay, ME; Massachusetts Bays and Buzzards Bay, MA; Narragansett Bay, RI; Long Island Sound, CT and NY; Peconic Bay, NY; San Juan Bay, PR; New York-New Jersey Harbor, NY and NJ; Delaware Estuary, NJ, PA, and DE; Delaware Inland Bays, DE; Albemarle-Pamlico Sounds, NC; Indian River Lagoon, Tampa Bay, and Sarasota Bay, FL; Barataria-Terrebonne Estuarine Complex, LA; Galveston Bay and Corpus Christi Bay, TX; Santa Monica Bay and San Francisco Estuary, CA; Tillamook Bay, OR; and Puget Sound, WA. Puget Sound, Buzzards Bay, and Narragansett Bay have completed CCMPs that have been approved by the EPA Administrator. Six other programs are expected to complete their CCMPs in FY 1994.

At present, EPA can provide no financial assistance to Management Conferences under §320 once the CCMP is completed, because §320(g)(2) allows grants to be awarded only for the *development* of CCMPs. However, under §320(b), Management Conferences must coordinate and facilitate the implementation of the plan, assess the effectiveness of implementation of the plan, and review proposed Federal projects for consistency with the CCMP. These statutory responsibilities cannot be met until the CCMP is completed and implementation begins, yet §320 provides no grant authority to support these activities. Because the development and implementation of a CCMP should be an iterative process, these monitoring and oversight responsibilities are critical so that mid-course corrections in management actions can be made.

For implementation of CCMP action plans, §320 directs that funding be sought from monies appropriated under Title II (construction grants), Title VI (SRF), and §319 (NPS grants). The Administration recognizes that the major responsibility for CCMP implementation remains with the States and localities where the benefits will be realized. Specific NEP Implementation grants and set-asides under the CWA would remove incentives to obtaining funds under existing authorities that may be more tailored to specific CCMP action plans. For example, activities in approved CCMPs are eligible under the construction grants, SRF, and NPS grants programs. Rather than changing the CWA, the Administration believes that States should revise their SRF and NPS funding priorities to reflect CCMPs.

RECOMMENDATION:

- The Administration recommends that §320 be amended to provide EPA the authority to award grants from currently available funds to support *limited oversight and facilitation activities*. Management Conferences would be extended or reconvened to conduct such oversight activities for a limited time, after which States would be expected to incorporate NEPs into their watershed management programs. CCMPs would need to be modified to meet the criteria for watershed management plans under State watershed management programs. (See Chapter 4 on Watershed Management and the following discussion of NEP and Watershed Management.)

THE NATIONAL ESTUARY PROGRAM AND THE WATERSHED PROTECTION PROGRAM

ISSUE:

What would be the relationship of the National Estuary Program to the proposed State Watershed Management Program?

BACKGROUND:

While EPA's National Estuary Program (NEP) and former Near Coastal Waters Program (NCW) have conducted action planning projects in about one quarter of the estuaries in the contiguous 48 States, they have also produced a body of methods, training programs, and other knowledge which can readily be transferred to other coastal and estuarine areas and similar efforts in any watershed. This technology and knowledge represents significant advancement in localized geographic targeting, multi-agency integration, consensus building, and ecosystem protection. Central to the success of the NEP is the use of basin-wide and watershed-wide targeting approaches to identify priority problems. In the proposed State Watershed Program (see Chapter 4) individual NEPs could provide much of the coastal component of the State Watershed program (as they are doing often in the case of the nonpoint source pollution control plans required under section 6217 of the Coastal Zone Act Reauthorization Amendments). The challenge is to build on what has been learned over the last eight years of the NCW and NEP and have the NEP and the State Watershed Programs be mutually supportive.

The proposed State Watershed Program presents a managing framework that is already employed by the NEPs. Furthermore, several of the NEPs are working on CCMPs that give detailed action plans for the surrounding watershed (including interstate) as well as for the estuary itself. Through amendments to the CWA, the NEPs and State Watershed Programs could be tied together by providing requirements and incentives for the CCMPs to be approvable under and consistent with the State's new watershed program. In some coastal States, the NEP could fulfill the coastal component of the watershed program and, in other States, be the beginning focal point and catalysts for the watershed program. While full NEPs would not be necessary in all estuaries, NEPs and other EPA coastal programs could provide technical assistance and guidance to coastal watershed management entities to help accelerate the development of their plans. In particular, NEPs have significant interstate experience and also have studied many controversial topics such as implementation financing alternatives. In addition, NEPs may have already activated key stakeholders who would have interests in broader watershed efforts.

RECOMMENDATIONS:

Changes to the CWA are necessary to ensure linkage of NEPs and State watershed programs. The Administration recommends that:

- In order to receive additional funding under section 320, NEPs in States with approved watershed management programs should be required to modify their CCMPs to be consistent with the States' requirements for watershed management plans. CCMPs developed under the NEP may be considered for approval as watershed management plans in States with approved watershed programs. If approved as watershed management plans, then CCMPs should be eligible for incentives under the watershed program.

- Future NEPs should be designated only if such action is consistent with the States watershed program and, after five years after enactment, only in those States with approved watershed programs.

GROUND WATER AND DRINKING WATER PROTECTION

ISSUE:

How should the CWA be revised to strengthen protection of ground water and better support efforts to protect sources of drinking water?

BACKGROUND:

Ground water is a vitally important resource; it supplies half of the Nation's drinking water and, on average Nationwide, 40 percent of annual streamflow. Ground water also discharges into lakes, wetlands, and estuaries. States have identified a broad range of ground water contaminants and contamination sources that threaten the resource, including sources that come under the authority of the CWA. In addition, a 1990 EPA survey of pesticides in drinking water showed that about 10.4 percent of the community water system wells nationwide contain detectable levels of one or more pesticides and that as many as 1,130 wells, serving some 3 million people, may have levels of nitrates above current health standards. Studies of such critical ecosystems as the Chesapeake Bay and the Everglades show that ground water discharges to surface waters can be a major source of contamination.

Despite the importance of ground water and the potential threats to human health and ecological systems from its contamination, ground water protection is not a major focus of the CWA. For example, ground water is not mentioned in the Goals and Policy section of the CWA, and throughout the Act terms such as "navigable waters" and "water quality standards" are intentionally limited to surface waters. However, water quality standards as implemented by NPDES permits, cannot adequately protect ground water sources.

In meeting human health objectives, watershed management programs could play a major role in helping prevent contamination of all sources of drinking water for public water systems. Preventing contamination of source waters represents the first line of defense against public health risks and escalated monitoring and treatment costs associated with meeting surface and drinking water quality standards. Coordination between watershed management programs and ground-water protection programs operating in the same watershed will be particularly important if the Administration's recommendations for amending the SDWA to establish prevention-based programs to protect sources of drinking water are enacted. States should be encouraged to build on existing Comprehensive State Ground water Protection Programs.

RECOMMENDATIONS:

The Administration recommends that the CWA be amended as follows:

- Add a national policy statement to the Goals and Policy section [101(a)] to acknowledge the interrelatedness of ground waters and surface waters and to state that CWA programs should reasonably avoid implementing actions to protect one medium at the expense of the other.

- Strengthen protection of human health as an objective of the CWA by adding public drinking water protection to the interim water quality goal in Goals and Policy subsection [101(a)(2)].

- Include human health protection from drinking water contamination as an important objective of provisions establishing watershed management programs. This will facilitate protection of drinking water sources as required by the SDWA.

- Confirm and clarify that a point source discharge to ground or to ground water that has a direct hydrological connection with surface waters is subject to regulation as a NPDES point source discharge if there is (1) a reasonably foreseeable direct hydrologic connection to surface waters in the proximity of the release, (2) a greater than de minimus quantity of the pollutant must reasonably be able to reach the surface water, and (3) no other Federal statute directly addresses the activity causing the release.

- Include priority ground waters and public drinking water supplies in any amendments to the CWA that require or encourage States to develop inventories of waterbodies and delineated watersheds to use as a basis for planning and protection.

- To any amendments to §305(b) that establish State water quality monitoring programs, include as a requirement of these programs that States provide indicators, to be determined by EPA, on the quality of current or reasonably anticipated sources of drinking water and require coordination with significant Federal, State, and local monitoring programs (including State and Federal drinking water and ground water monitoring programs).

- Amend §305(b) to allow States, at their discretion, to include in their water quality monitoring programs monitoring of ground water to determine ground water quality and the interaction between water pollution problems in ground water, surface water, aquatic sediment, and wetlands.

- Provide that State grant provisions in the CWA (e.g., 106, 319) continue to allow funding of State ground water protection activities.

- To the extent possible, make the CWA amendments consistent with the SDWA or any amendments thereto.

INCREASING TRIBAL ASSUMPTION OF EPA WATER PROGRAMS

ISSUE:

How should the CWA be amended to foster tribal assumption of water quality programs?

BACKGROUND:

Tribal governments have made great progress in developing and implementing EPA's water programs since the 1987 CWA Amendments included §518, which addresses Indian water program development and assumption. Section 518 authorizes EPA to treat Tribes that meet certain prerequisites in the same manner in which it treats States, for purposes of specific programs for which Tribes are eligible to apply for grant funding and/or to administer. It also establishes specific requirements a Tribe must comply with in order to be treated as States for purposes of assuming administration of water programs. Section 518 also sets forth a specific funding limitation for grants to Tribes under §319.

EPA has issued final regulations identifying requirements for Indian Tribes to be treated as States for purposes of water programs, with the exception of the NPDES Permit Rule which will be finalized shortly. Approximately 80 "Treatment as a State" determinations have been made under various CWA grant programs. EPA has approved the Water Quality Standards Program developed by the Pueblo of Isleta, Pueblo of Sandia and Pueblo of San Juan. EPA also expects other Tribes to apply for assumption of other environmental programs shortly. Many Tribes have made significant progress in developing the capacity and identifying the resources necessary for program assumption.

Despite this progress, EPA and Tribal officials have experienced a number of barriers that complicate Tribal assumption of water programs. Some of these barriers are due specifically to provisions of the current CWA and should be addressed through amendments to the law. These statutory barriers are exacerbated by current budget constraints being experienced across the Federal government. To ensure environmental protection of water resources on Indian lands, we need to establish an efficient Indian program under the CWA - one that minimizes administrative burden, provides an appropriate amount of flexibility, and supports the Federal government's and EPA's Indian policies.

<u>Lack of Resources for Water Quality Programs</u>

The most significant barrier to full implementation of the Indian water quality programs is the lack of adequate resources necessary for Indian Tribes to develop the capacity to implement the various water programs and for EPA to provide Tribes

financial and technical assistance. This has resulted in fragmented program implementation. To date, Tribes are using grant assistance to employ and train staff and purchase equipment. Without continuing grant support, they cannot maintain staffing and/or utilize equipment. While these activities are critical, Tribes need increased long-term funding that can be counted on for program development as well as EPA technical assistance to undertake activities necessary for program assumption.

Funding Caps or Limitations

CWA sets limits on the use of funds by Indian Tribes for program implementation in that Tribes can receive no more than 1/3 of 1 percent of total appropriations in a given year for the §319 NPS Program and 1/2 of 1 percent set-aside of appropriations under Title VI for construction of treatment works. These caps limit EPA's ability to provide grants for Tribal program development and delegate authority to Indian Tribes to administer water programs.

Match Requirements

CWA established specific requirements for Indian Tribes to match Federal funds under certain program grants. Clean Lakes grants and NPS grants require 30 percent and 40 percent matches, respectively. Matching requirements may prevent Tribes with real needs and statutory responsibility for implementing environmental programs, from qualifying for grants. EPA recognizes the economic hardship some Tribes experience. Match requirements for "needy Tribes" impede EPA's ability to ensure environmental protection on an equitable basis.

Administrative Burden and Confusion of Multiple Grant Requirements

§518 of CWA presents significant administrative burdens to the Tribes. The separate grant programs covered in §518 (not to mention programs under other environmental statutes) have different administrative requirements, time lines, and application procedures, among others. Consequently, it has been difficult for EPA and Tribes to track the different requirements. Paperwork requirements and the resources needed simply to administer the various grant programs separately--have also been overwhelming for the Tribes. Most Tribes do not have the large infrastructure of State agencies to administer separate programs. As a result, Tribes currently spend a significant part of their resources on staffing and addressing administrative requirements rather than developing regulatory programs and conducting environmental monitoring.

RECOMMENDATIONS:

The CWA should be amended as follows:

- Provide EPA with authority to establish a comprehensive water grant modeled after the recent Indian Environmental General Assistance Act of 1992 (PL 102-497 -- Section 11), which would allow Tribes to develop "integrated" water programs customized to their specific needs. However, the set-aside from title VI appropriations for construction of treatment works should remain a separate grant authority under §518 and be raised to 1 percent. The comprehensive water grant authority should:

  - o include either a level-of-effort or a 5 percent match requirement which could be waived based on Tribal hardship;
  - o establish a level of up to 5 percent of specific program appropriations for an Indian set-aside; and,
  - o not include any "Treatment as a State" requirements except for a requirement to demonstrate the capability to administer the comprehensive grant. (While "Treatment as a State" requirements should be deleted for purposes of the comprehensive grant, Indian Tribes should still be required to demonstrate capability and appropriate jurisdiction to receive authorization to administer the Water Quality Standards, Wetlands, §319 nonpoint sources and NPDES/Sludge Regulatory Programs.)

- Remove the one-third of one percent limitation in §518(f) for grants for Indian Tribe nonpoint source programs.

- Provide EPA with discretionary authority to waive CWA grant eligibility requirements as EPA deems appropriate to expedite Tribal assumption of CWA programs. This provision would authorize EPA to examine, on a grant program basis, and waive where appropriate, provisions that present unnecessary impediments to Tribal assumption of CWA programs.

WATER USE EFFICIENCY

ISSUE:

Currently there is no legislative framework for pursuing federal policy on, or promoting, water use efficiency. With a commitment to water use efficiency we could add opportunities for more efficient resource decisions and achieve environmental benefits (e.g., avoid construction of overly large municipal wastewater facilities).

BACKGROUND:

There is a growing interest on the part of environmental groups, the public, Congress and the Administration in improved water resource management as a way to achieve water quality and quantity goals. A number of environmental benefits can be achieved through water use efficiency, including the reduction of industrial pollutants through recycling of process water, protection of aquatic habitats because using less water helps maintain streamflows, and conservation of energy because less water needs to be pumped, treated, and heated. Additionally, the benefits of water efficiency, both in terms of preventing pollution and of reducing the need for and cost of water supply and wastewater treatment facilities, can be achieved very cost-effectively.

The Administration also recognizes that regional, state, and local differences exist regarding water quality, quantity, and usage. These differences favor a prudent approach in which water efficiency programs are tailored for specific locales.

S. 1114 proposes to promote water conservation by coordinating federal policies, providing technical assistance to public agencies, and establishing a national information clearinghouse.

RECOMMENDATIONS:

To promote efficient water use, the federal government's primary role should be to provide technical assistance and information, including the following activities:

- Foster research and development of new and improved methods to achieve water use efficiency.

- Identify, develop, and demonstrate innovative technologies and techniques used to achieve water use efficiency.

- Promote integrated resource planning for future water needs that incorporates demand management, fully addresses surface water and ground water needs and environmental impacts, and allows participation by all affected parties.

- Support the establishment of a national clearinghouse of information on efficient water use.

- Provide technical assistance to all water use sectors to evaluate and implement water efficiency programs.

- Advocate beneficial water reuse and wastewater reclamation, especially in the arid and semi-arid regions of the country, consistent with public health and environmental standards.

- Promote the use of SRF for development and implementation of water use efficiency activities.

MARKET-BASED APPROACHES

ISSUE:

How should other market-based incentives be encouraged and implemented in the reauthorized CWA to reduce pollution?

BACKGROUND:

Federal policy for controlling water pollution for the most part has not relied on economic incentives. The Administration's proposal for the 1994 reauthorization of the CWA endorses programs for trading water pollution reduction credits because such programs can potentially reduce the cost of meeting water quality or loadings reduction goals. However, other potentially promising incentive approaches, particularly the use of fertilizer taxes to reduce agricultural loadings of nitrogen and phosphorus, are also potential ways of harnessing market incentives to realize cost-effective pollutant reductions.

RECOMMENDATIONS:

- EPA should undertake a study of the feasibility, implementability, and cost-effectiveness of fertilizer taxes, taxes on the discharge of harmful pollutants, and other promising market-oriented incentive approaches in comparison to approaches mandated or encouraged by the CWA.

- EPA should submit this report, together with recommendations on the future use of such incentive approaches, to Congress and interested states within three years of enactment.

BENEFITS AND COSTS OF THE REAUTHORIZED CLEAN WATER ACT

ISSUE:

How should the CWA provisions be evaluated for their cost effectiveness in achieving environmental goals?

BACKGROUND:

The CWA has achieved significant improvements in water quality over the last twenty years. The reauthorized Act will do even more.

Nevertheless, the solution to these environmental problems is more difficult today given the number and variety of pollutant sources and other conditions that affect water systems. For example, reduced levels of a fish population in a river could be due to a combination of factors including land development in riparian zones, low level of toxic contaminants from both urban and agricultural runoff, and siltation from urban development and agriculture. Mandated controls on some or all of these activities may improve water quality but by an uncertain amount. This makes it difficult for the Administration to identify and quantify specific future controls that result in a quantifiable improvement in water resource quality.

In order to improve the ability of the Administration to evaluate the effect of the reauthorized Act, to identify and project the affect of future controls on activities on water quality, and to develop cost-effective approaches for realizing environmental goals, additional information collection and analysis methods will be needed. For example, the Administration will need information to comprehensively assess water quality in sufficient number of waters over time in order to determine water quality trends in response to new controls on storm water and combined sewer overflows.

This type of information collection and analysis is not without precedent. Congress directed EPA in the Clean Air Act Amendments of 1990, Section 812, to perform a comprehensive analysis of the impact of the 1990 amendments with respect to improvements in air quality. A similar assessment would be beneficial for the CWA.

RECOMMENDATIONS:

- The Administrator of the EPA, in consultation with other agencies, as appropriate, should conduct a comprehensive analysis of the impact of the 1994 CWA amendments on the public health, economy, and environment of the United States. In performing such analysis, the Administrator should consider the incremental costs, incremental benefits, and other incremental effects associated with various major elements of the reauthorized Act such as

municipal and industrial storm water controls, agricultural runoff controls, etc. This analysis should also include, to the extent practicable, a quantitative analysis of current (baseline) water quality conditions in U.S. waters to serve as the launching point for the benefit-cost analysis. It should also include an assessment of the reliability of techniques and existing estimates of the benefits of water quality improvements.

- As part of the effort to improve benefit measurement, the Administrator should review, evaluate, and where appropriate, improve current protocols for the collection, processing, interpretation and use of data describing water quality and health and environmental effects related to water quality. In particular, the Administrator should seek further to improve the State section 305(b) water quality inventory reports so as to permit a more meaningful comparison between different regions and baselines. One goal of this effort is to be in a better position than today to describe quantitatively the benefits and costs of this Act and future amendments to this Act as a means of improving the cost-effectiveness of programs to improve water quality. Another goal of this effort is to make data available to researchers outside of the government to evaluate the success of this Act and to help improve upon it.

- As a companion to the comprehensive inventory of water quality proposed for section 305(c), EPA should submit a report to Congress that summarizes its comprehensive analysis, reporting current baseline water quality conditions, the amount such conditions have changed as a result of the Act and all benefits and costs (and other effects) accrued and expected to be accrued as a result of the Act. The report should also contain a review and evaluation of the water quality data used for the analysis and plans for the improvement of data collection, processing, and modeling protocols; and a review and evaluation of the methods used to analyze such data and estimate health and environmental benefits and plans for the improvement of such methods.